

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 18TH DAY OF JUNE 2015/28TH JYAISHTA, 1937

SA.No. 477 of 2000 (F)

**AGAINST THE JUDGMENT IN AS 80/1993 of SUB COURT, PAYYANNUR
DATED 03-01-2000**

**AGAINST THE JUDGMENT IN OS 264/1991 of MUNSIFF COURT, TALIPARAMBA
DATED 29-06-1993**

APPELLANT(S):(APPELLANT/DEFENDANT):

**CHAMATHAKARI BHARGAVI,
D/O. THAMBAI,
RESIDING AT ERUVESY AMSOM AND DESOM,
TALIPARAMBA TALUK**

**BY ADVS.SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.JOJI VARGHESE
SRI.M.HARISHARMA
SRI.T.PELDHOSE**

RESPONDENT(S) (RESPONDENT/PLAINTIFF):

**PUTHIYAPURAYIL MUHAMMED ASHRAFF,
S/O. UMMER,
RESIDING AT SREEKANDAPURAM AMSOM,
KAITHRAPRAM DESOM,
TALIPARAMBA TALUK.**

BY ADV. SRI.M.SASINDRAN

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18-06-2015,
ALONG WITH SA. 479/2000, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

ds

P.BHAVADASAN, J.

S.A. Nos. 477 & 479 of 2000

Dated this the 18th day of June, 2015

J U D G M E N T

Two suits, namely O.S.Nos. 264/1991 and 453/1991, were jointly tried and disposed of by a common judgment. Among them, O.S.No. 264/1991 was a suit for specific performance or in the alternate relief of return of advance amount. O.S.No.453/1991 was laid by the defendant in O.S.No.264/1991 claiming damages for the loss suffered by the non performance of the contract by the plaintiff in O.S.No. 264/1991. O.S.No.264/1991 was decreed and O.S.No.453/1991 was dismissed. The aggrieved party preferred two appeals as A.S.Nos. 80/1993 and 82/1993 before the lower appellate court. The lower appellate court, on re-appreciation of the evidence, found no reason to disagree with the trial court and dismissed the appeals. That brings the defendant in O.S.No.264/1999 before this Court.

2. S.A.No.479/2000 is directed against the decree in O.S.No.453/1991 and S.A.No.477/2000 is directed against the decree in O.S.No.264/1991. At the outset itself, it may be said that there is nothing to reconsider in S.A.No.479/2000 which arises from O.S.No.453/1991.

3. That, as already stated, was a suit filed by the defendant in O.S.No.264/1991 for damages on the ground that the plaintiff in O.S.No.264/1991 had committed breach, consequent to which, the plaintiff in O.S.No. 453/1991 had suffered damages. Both the courts below found that there is no substance in the plea taken by the plaintiff in O.S.No.453/1991 and dismissed the suit which was confirmed in appeal. That being essentially a question of fact based on appreciation of evidence, no substantial question of law arises for consideration in S.A.No.479/2000 and it is accordingly dismissed.

4. In S.A.No. 477/2000, the following substantial questions of law were formulated:

“1. Whether the courts below have acted with jurisdiction, in granting a decree for specific performance of an agreement, without entering a finding on the question of exercise of discretion in terms of the provisions of Section 20 of the Specific Relief Act.

2. Whether the court is bound to grant a decree for specific performance merely because the alleged agreement is liable to be upheld, and is not the court bound to take into account the various intervening facts and circumstances as also efflux of time before granting a decree for specific performance.

3. Whether the documents produced by a party could be discarded on the assumption that they are concocted, and without anything more.

4. Whether it is the mandatory requirement of law that the scribe of an agreement should be examined, for the court to uphold such agreement.

5. Whether under the facts and circumstances of the case, the courts below were right in granting a decree for specific performance.”

5. The learned counsel appearing for the appellant raised only one point for consideration. According to the learned counsel, both the courts below have not considered the discretion that is to be exercised under Section 20(b) of the Specific Relief Act which is mandatory in nature and it casts an obligation on the court to do so; be there any defence or not, or be there a written statement or not to consider whether it is equitable, just and reasonable, to grant a decree for specific performance. No such exercise has been undertaken in that regard by either the trial court or the lower appellate court and that, according to the learned counsel, is sufficient to vitiate a decree. In support of the contention, the learned counsel relied on the decision reported in **Prasanna v. Sreedharan** (1995 (2) KLT 499),

Sathy v. Sayed Moammed (1998 (1) KLT 141), **Adimakutty Hydu Ali v. Ambujam** (2003 (2) KLT 328) and **Thomas P. Abraham v. Aleyamma Abraham** (2003 (3) KLT 864). The learned counsel stressed the observation of this Court in the decision reported in **Thomas P. Abraham v. Aleyamma Abraham** (2003 (3) KLT 864) wherein, it was observed that even when the written statement was not filed, the court was not absolved of its duty to consider the discretionary relief that is to be granted under Section 20 of the Specific Relief Act. It is accordingly contended that the decree granted in O.S.No. 264/1991 is unsustainable in law and the matter has to be sent for reconsideration.

6. The learned counsel appearing for the respondent on the other hand pointed out that though the judgment of the courts below do not as such specify regarding the exercise of discretion, there is nothing in the written statement or in the evidence to show that by virtue of granting a decree for specific performance, any loss or

damage is caused to the defendant. In fact, there is no plea in the written statement that by granting the discretionary relief for specific performance to the plaintiff, any loss or hardship is caused to the defendant. Attention was also drawn to the Ext.B3 notice sent by the plaintiff in O.S.No.264/1991 to the defendant, informing the defendant about the readiness and willingness of the plaintiff to perform the contract and to appear in the Registrar's Office on 25.06.1991. Apart from the fact that there was no reply to that notice, it is also pointed out that there was no presence of the defendant on 25.06.1991. The learned counsel went on to point out that in fact, the written statement filed by the defendant would show that they have no grievance in granting a decree for specific performance except that they be reimbursed of the amounts which the defendant had advanced and for the expenses incurred for shifting the articles in pursuant to an agreement for sale said to have been entered into by them with a stranger in

consequence of the agreement of sale in O.S.No.264/1991. The learned counsel emphasized that there is no case for the defendant that they are rendered homeless or that any other visible hardship is caused to them.

7. The learned counsel for the respondent placed considerable reliance on the decision reported in **Prakash Chandra v. Narayan** ((2012) 5 SCC 403) and pointed out that unless there is a defence taken and the evidence adduced in that regard, the question of considering a discretion in favour of defendant does not arise for consideration.

8. After having heard both sides and after having perused the records, there is considerable force in the submission made by both sides. In the decisions relied on by the learned counsel for the appellant it would appear that it is an obligatory and mandatory duty on the part of the court to consider the question of discretion to be exercised under Section 20 of the Specific Relief Act even in cases

where the written statement is not filed or the defendant is set ex parte. In the decision reported in **Prakash Chandra v. Narayan** ((2012) 5 SCC 403), the Apex Court held that unless there is a defence taken in that regard and evidence adduced, it is not necessary to consider that question at all.

9. Assuming that the matter is to be sent back, it does not make much of a difference in the light of the written statement filed by the defendant. As rightly noticed by the learned counsel for the respondent, apart from the fact that there is no plea of any hardship or any other inconvenience, the defendant had expressed her readiness and willingness to execute the deed on payment of additional sum of ₹ 8,370/-. Under such circumstances, the learned counsel points out that it is an idle exercise to send back the case for consideration of discretion.

10. It has to be said that there is considerable force in the above submission. The decisions reported in **Prasanna v. Sreedharan** (1995 (2) KLT 499), **Sathy v. Sayed**

Moammed (1998 (1) KLT 141), **Adimakutty Hydu Ali v. Ambujam** (2003 (2) KLT 328) and **Thomas P. Abraham v. Aleyamma Abraham** (2003 (3) KLT 864) will have to be read in the context of the facts of those case and cannot be isolated from the facts. True, in one of the cases, it was said even if it is an ex parte decree, the issue has to be considered. Probably, it is with the view that there may be several reasons why a person had to remain away from court and that does not preclude the court from considering the discretionary remedy.

11. But the case here is on a different footing. Not only that the defendant had not set up any hardship or inconvenience, the defendant has expressed the readiness and willingness to execute the deed even as on the date of written statement, provided, an additional sum of ₹8,370/- is paid. That is the amount, which they say, they paid as advance for buying another property and for the expenses incurred for shifting their articles. Her own written

statement indicates that the other person had withdrawn from the agreement, but there is no case in the written statement in O.S.No. 264/1991 that the defendant has suffered any damages or loss on account of that transaction.

12. Of course, this Court is not forgetting the fact that a subsequent suit has been filed as O.S.No.453/1991 claiming damages which can only be an afterthought.

13. There have been instances where the courts have modulated the relief in such a manner so as to do justice between the parties. One shall not forget the fact that transaction is of the year 1991 and we are in 2015. 24 years have elapsed and to send back the case for this purpose alone, especially when the defendant in the suit, on the date of filing of the written statement was willing to execute the sale deed as on that date, provided an additional amount was given, it will be quite inappropriate and unjust. However, for the long passage of time, necessarily the defendant will have to be compensated, though it is not due

to the fault of the plaintiff. The rise in prices and such other factors etc. have a bearing on this issue.

14. Therefore, this appeal is partly allowed and the decree stands modified as follows:

The plaintiff in O.S.No.264/1991 shall deposit an amount of ₹20,000/- (Rupees Twenty Thousand only) within two months from the date of this judgment and on deposit of which, the defendant shall execute a sale deed in favour of the plaintiff with respect to the property involved in the agreement and if the amount is deposited and the sale deed is not executed by the defendant, the plaintiff can get the sale deed executed through court.

Sd/-
P.BHAVADASAN
JUDGE

ds

//True copy//

P.A. to Judge