

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

SA.No. 714 of 2002

AGAINST THE JUDGMENT IN AS 267/2000 of II ADDL.DISTRICT
COURT, ERNAKULAM.

AGAINST THE JUDGMENT IN OS 724/1998 of PRINCIPAL MUNSIF
COURT, ERNAKULAM.

APPELLANT(S)/RESPONDENT/DEFENDANT:

RAMLA, W/O. ANDHU, AGED 43 YEARS,
RESIDING AT POOLOTTU KALAPURAYIL HOUSE,
KAKKANAD VILLAGE, KAKKANAD KARA,
ERNAKULAM DISTRICT.

BY ADV. SRI.P.M.JOSHI

RESPONDENT(S)/APPELLANTS/PLAINTIFFS:

1. JOSEPH SIMON, S/O. JOSEPH,
AGED 47 YEARS, RESIDING AT ELANJIKKAL HOUSE,
ELAMKULAM VILLAGE, KALOOR DESOM,
ERNAKULAM DISTRICT.
2. C.M. KUNJUMHAMMED UNNI,
S/O. C.K. MOHAMMED, AGED 35 YEARS,
HAZEENA MANZIL,
KADUNGALLOOR VILLAGE, KUTTIKATTUKARA,
ERNAKULAM DISTRICT.

BY ADV. SRI. R. SANJITH

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
09-06-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

P. BHAVADASAN, J.

S.A. No. 714 of 2002

Dated this the 9th day of June, 2015.

JUDGMENT

The defendant in O.S. 724 of 1998 is the appellant. She suffered a decree for specific performance at the hands of the lower appellate court, though before the trial court she was directed to return the advance amount received by her.

2. Most of the facts are not in dispute.

3. As per Ext.A1 dated 5.5.1995, the defendant agreed to sell 2 cents of property to the plaintiffs and the consideration was fixed as Rs.25,000/-. The period of completion of the transaction was fixed as six months and on the date of agreement Rs.10,000/- was paid as advance. The balance was to be paid on the basis of the measurements to be made at the time of execution of the sale deed. The plaintiffs complained that

inspite of several attempts to get the sale deed executed, the defendant was not amenable and hence the suit was laid.

4. The defendant resisted the suit. The allegations in the plaint were denied and it is contended that the time specified in the contract was the essence of the contract and the defendant had satisfied the title and extent of property and that the property had been measured in the presence of the second plaintiff with the help of the Village Officer. A sketch prepared to that effect was handed over to the plaintiffs. The defendants were always ready and willing to perform their part of the contract and it was the plaintiffs who had committed the breach. On the basis of these contentions, the defendant prayed for a dismissal of the suit.

5. Issues were raised by the trial court and the parties let in evidence. The evidence

consists of the testimony of P.W.1 and documents marked as Exts.A1 to A4 from the side of the plaintiffs. The defendant examined D.W.1. The trial court on a consideration of the materials came to the conclusion that the plaintiffs were not justified in delaying the transaction and seeking specific performance after two years and the trial court was not impressed by the conduct of the plaintiffs. Therefore, it declined to grant specific performance of the contract and instead passed a decree as follows:

"All the same, the plaintiffs are granted a decree for Rs.10,000/- with interest at 6% per annum from the date of suit to the date of realization, charged on the plaint schedule property. I also hold that the plaintiffs shall be entitled to cost, proportionate to the relief granted."

6. The aggrieved plaintiffs carried the matter in appeal as A.S. 267 of 2000. The

appellate court found that the defendant has committed breach of contract and that the plaintiffs are entitled to specific performance. Therefore, a decree for specific performance was granted.

7. That brings the defendant before this Court. Notice has been issued on the following questions of law:

"Whether the 1st appellate court has exercised the discretion by ignoring the statutory provision and judicial precedents by allowing the decree for specific performance in a case when suit is filed after 3 years from the date of agreement."

8. Learned counsel appearing for the appellant contended that the lower appellate court was not justified in reversing the decree of the trial court especially when a discretion has been exercised by the trial court. Unless it is shown that the discretion was improperly exercised or has

no judicial backing, it is quite improper for the lower appellate court to interfere with the decree of the trial court. It is also contended that the finding of the court below that the defendant was in breach was not supported by any evidence at all. At any rate, there is no justification for interfering with the decree of the trial court.

9. Learned counsel appearing for the respondents on the other hand submitted that there are no grounds to interfere with the decree of the lower appellate court.

10. After having heard learned counsel on both sides, it is felt that there is considerable force in the submission made by the learned counsel for the appellant. The lower appellate court on an analysis of the evidence came to the conclusion that it was due to the fault on the part of the defendant that the transaction could not be put through and she had deliberately taken advantage

of the passage of time. It is specifically averred in the written statement that measurement had been done and plan had been made available to the plaintiffs. The trial court found that there were measurements on several occasions and under one pretext or another, the plaintiffs continued to have repeated measurements. The trial court on a fair reading of the materials came to the conclusion that the plaintiff is in breach. It is not found by the lower appellate court that the trial court has erred in any manner in its conclusion. Quite strangely then the lower appellate court came to the conclusion that there was no attempt from the side of the defendant to measure and demarcate the property, which is a finding contrary to the evidence on record. Suffice to say, the reason given by the lower appellate court to interfere with the decree of the trial court is not justified.

11. The appellants have rightly pointed out that the trial court has chosen to exercise a discretion and reason has also been given for the exercise of that discretion in favour of the defendant and in not granting relief in favour of the plaintiffs. No reasons are given by the lower appellate court as to why the exercise should be interfered with.

In the result, this appeal is allowed, the impugned judgment and decree are set aside and the judgment and decree of the trial court is restored.

sb.

P. BHAVADASAN,
JUDGE