IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

WEDNESDAY, THE 11TH DAY OF NOVEMBER 2020 / 20TH KARTHIKA, 1942

RFA.No.987 OF 2012

AGAINST THE JUDGMENT AND DECREE DTD 12.4.2011 IN OS 231/2010 OF SUB COURT, KOCHI

APPELLANT/PLAINTIFF:

ROSE MARY JOSLIN @ ROSE MARY JOSEPH, W/O. JOSEPH, AGED 31 YEARS, VETTIYAZHEEKKAL HOUSE SOUTH MOOLAMKUZHI MURI, RAMESWARAM VILLAGE, KOCHI TALUK, REPRESENTED BY HER POWER OF ATTORNEY HOLDER A.M.JOSLIN, S/O.MICHAEL, AGED 70 YEARS, ALUMPARAMBIL HOUSE, HOUSE NO.15/443 A, SOUTH MOOLAMKUZHI MURI, RAMESWARAM VILLAGE, MUNDAMVELI P O, KOCHI.

BY ADVS. SRI.G.KRISHNAKUMAR
SRI.TITTO THOMAS

RESPONDENTS/DEFENDANTS:

1 **MABLE, AGED 57 YEARS, W/O.LATE ANDREWS PINHERO, CHEENIKKAPARAMBIL HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE, KOCHI TALUK - 682 002.**

2 **JANET, AGED 38 YEARS, D/O. LATE ANDREWS PINHERO CHEENIKKAPARAMBIL HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE, KOCHI TALUK - 682 002.**

3 **MANUEL AGED 33 YEARS, S/O. LATE ANDREWS PINHERO CHEENIKKAPARAMBIL HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE, KOCHI TALUK - 682 002.**

4 MARY JEMMA, AGED 31 YEARS,
D/O. LATE ANDREWS PINHERO CHEENIKKAPARAMBIL
HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE,
KOCHI TALUK - 682 002.

5 JOSEPH JAISON, AGED 28 YEARS,
S/O. LATE ANDREWS PINHERO CHEENIKKAPARAMBIL
HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE,
KOCHI TALUK - 682 002.

6 LUCY JENCY, AGED 26 YEARS,
D/O. LATE ANDREWS PINHERO, CHEENIKKAPARAMBIL
HOUSE MOOLAMKUZHI MURI, RAMESWARAM VILLAGE,
KOCHI TALUK - 682 002.

7 SIMON JERSON
AGED 22 YEARS,
S/O. LATE ANDREWS PINHERO, CHEENIKKAPARAMBIL
HOUSE, MOOLAMKUZHI MURI, RAMESWARAM VILLAGE,
KOCHI TALUK - 682 002.

8 LUKOSE, AGED 46 YEARS,
FATHER'S NAME IS NOT KNOWN TO THE APPELLANT,
PALLIPARAMBIL HOUSE, MUNDAMVELI P.O.,
KOCHI-682 507

9 T.P. ANILA
W/O. CHANDRABOSE, AGED 41 YRS, KAMMATTIPARAMBIL
HOUSE, HOUSE NO.20/511 A, NAMBIAPURAM ROAD,
PALLURUTHY P.O. KOCHI-682 006.

R1-7 BY ADV. SRI.K.V.BINOD
R1-7 BY ADV. SRI.T.MADHU
R9 BY ADV. SRI.M.H.HASEEB

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 09-11-2020, THE COURT ON 11-11-2020 DELIVERED THE FOLLOWING:

Dated this the 11th day of November, 2020

J U D G M E N T

Plaintiff is the appellant. Her suit for specific performance was dismissed and alternate claim for advance amount was decreed in O.S.No.231/2010 filed by her.

2. The agreement for sale executed in her favour was with respect to plaint schedule 2.875 cents of land with residential building. The defendants 1 to 7 are the co-owners of the property who executed Ext.A1 agreement for sale on 2.4.2008. Appellant's case in the plaint is that property was agreed for a sale price of Rs.7,25,000/- and the term of agreement was four months. She paid advance amount of Rs.2 lakhs on the date of Ext.A1 and on 30.8.2008, she sent suit notice demanding execution of sale deed. The suit was filed only in 2010. Appellant explains the delay stating that it was

contributed to by the owners themselves. They had created an encumbrance in respect of the property in favour of eighth defendant and for clearing the encumbrance, the defendants sought time and that was how the appellant was made to wait. Later, the dispute with eighth respondent was settled. There was one more subsequent development which the appellant came across which caused her to implead the ninth defendant on the date of suit itself. In fact, there was a prior agreement with the ninth defendant executed by defendants 1 to 7 as early as on 25.7.2007 which was suppressed from appellant's notice. Defendants 1 to 8 made the appellant believe that they would return the advance amount to ninth defendant after waiting for the final result of O.S.No.144/2008 filed against them for specific performance. Later, it was understood that O.S.No.144/2008 was rejected for non payment of

court fees and all obstructions for appellant's claim for specific performance stood removed. Since defendants were not interested in executing the sale deed, the suit was filed thereafter.

3. It is significant to note that none of the defendants contested the suit and appellant filed proof affidavit and on her side, Exts.A1 to A8 were admitted in evidence.

4. The court below was not nevertheless satisfied with the claim for specific performance and accordingly limited the decree to return of advance amount with interest. The reason which weighed the court below to dismiss the suit for specific performance was that there was subsisting encumbrance in favour of the eighth defendant, for which he had filed O.S.No.155/2008 which was pending. Likewise in favour of ninth defendant, there was already a prior agreement executed, for

which she had filed O.S.No.144/2008 seeking decree of specific performance. These reasons may at first blush, appear to justify the court's exercise of discretion against the appellant dismissing the suit for specific performance of contract.

5. I heard the learned counsel for the appellant and also counsel appearing for all the respondents.

6. Subsequent developments were brought to my notice pending the appeal. It is not correct to say that eighth defendant was holding encumbrance in respect of plaint property since O.S.No.155 of 2008 filed by him against defendants 1 to 8 was dismissed as settled. That means, there is nothing at all to show that the property is still outstanding on any encumbrance or is subject to such other interests in favour of the eighth defendant. A copy of award in O.S.No.155/2008 passed by Lok Adalat

held on 18.12.2009 was produced in appeal along with memo submitted by the counsel for the appellant. O.S.No.144/2008 was prosecuted by the ninth defendant after setting aside the order of rejection of the plaint and she got a decree against defendants 1 to 7 on 23.1.2014 for refund of advance amount of Rs.1,20,000/- with interest. A copy of the judgment was also produced in appeal which shows that no charge was created for the arrears of advance amount in respect of the suit property. That means there is nothing which stands in the way of Ext.A1 agreement for sale being enforced in respect of the plaint property in as much as claim of the ninth defendant is limited to refund of money alone.

7. I am satisfied after hearing both sides, that the reasons exercised for not decreeing suit for specific performance have now vanished. I do

not find any reason to refuse to accept the suit claim of the appellant because the plaint contentions have not been rebutted. The evidence given by the appellant that she was ready and willing to perform her part of the contract stands unrebutted and further proved also. The judgment and decree of the court below therefore require to be reversed.

8. The appellant has made it clear in the plaint that she is prepared to discharge whatever lawful claim that stands in favour of the defendants 8 and 9 in the property. Therefore, I am of the opinion that the rights of the ninth defendant can be adjusted against the balance purchase money payable by the appellant.

In the result, appeal is allowed in reversal of the judgment and decree and the suit is decreed in the following terms;

(i) The appellant will be entitled to a

decree for specific performance of Ext.A1 agreement for sale dated 2.4.2008 subject to her depositing the balance purchase price due under the contract after adjusting with the claim of the ninth defendant or any other subsisting encumbrance if any, in favour of the 8th defendant.

(ii) The purchase money shall be deposited within one month from today. Upon such deposit, the court below will execute sale deed and convey all interests in respect of the suit property in favour of the appellant in exercise of powers under Section 28 of the Specific Reliefs Act, 1963.

(iii) It is made clear that execution of sale deed in favour of the appellant shall be made only after discharging all subsisting liabilities incurred by respondents 8 and 9.

(iv) Parties will suffer the costs in both courts.

All pending interlocutory applications are closed.

Sd/-

T.V.ANILKUMAR
JUDGE

ami/