

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

MONDAY, THE 30TH DAY OF JUNE 2014/9TH ASHADHA, 1936

AS.No. 721 of 1999 ()

AGAINST THE JUDGMENT IN OS 101/1997 of SUB COURT, PALA DATED
14-07-1999

APPELLANT/PLAINTIFF:

JOHN MATHEW, S/O. MATHEW ,
THOTTUPURATH HOUSE,
PIRAYAR KARA,
KIDANGOOR VILLAGE, KOTTAYAM DISTRICT.
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER
MATHAI @ MATHEW, S/O. MATHAI, THOTTAPURATH HOUSE,
KIDANGOOR, KIDANGOOR VILLAGE, MEENACHIL TALUK,
KOTTAYAM DISTRICT.
(POWER OF ATTORNEY DATED 18.10.1996 SIGNED BEFORE ATTACHE,
EMBASSY OF INDIA, RIYAD).

BY ADVS.SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN

RESPONDENTS 1 TO 3/DEFENDANTS 1 TO 3

1. RAMAN, S/O. KUTTAPPAN, EDAKKALATHIL HOUSE,
PUNNATHARA KARA, ETTUMANNOOR VILLAGE,
P.O.VETTIMUKAL, KOTTAYAM TALUK AND DISTRICT.
2. KARUNAKARAN, S/O. KUTTAPPAN, -DO- -DO-
3. PARU, W/O. KUTTAPPAN, -DO- -DO- -DO- DIED RECORDED

(IT IS RECORDED AT THE RISK OF THE APPELLANT THAT THE 3RD
RESPONDENT DIED ON 29.10.11 AND THERE IS NO NEED OR NECESSITY TO
IMPLEAD ANY LEGAL REPRESENTATIVES OF THE DECEASED R3 AND HER TWO SONS
ARE ALREADY IN THE PARTY ARRAY AS R1 & R2 AS PER ORDER DATED 13.8.12
ON MEMO DATED 30.7.2012.)

R,R1 & R2 BY ADV. SRI.K.JAGADEESCHANDRAN NAIR
R,R1 & R2 BY ADV. SRI.J.KRISHNAKUMAR

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 30-06-2014,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

rtr/-

T.R.RAMACHANDRAN NAIR &
P.V.ASHA, JJ

A.S.NO.721/1999

JUDGMENT

30.7.2014

T.R.RAMACHANDRAN NAIR & P.V ASHA, JJ.

A.S No.721 of 1999

Dated this the 30th day of June, 2014

J U D G M E N T

Asha, J.

Appellant is the plaintiff in O.S.No.101 of 1997 on the file of the Court of Subordinate Judge, Pala. The suit was filed for specific performance of an agreement for sale executed between the plaintiff and defendants. The court below declined to exercise its discretion and the alternative prayer for return of money was decreed.

2. The case projected in the court below by the parties to the suit are as given below.

3. Defendants 1 to 3 are the owners of plaint schedule property, having an extent of 1 acre and 6 cents of land. Ext.A3 agreement was executed by the defendants on 17.06.1992 in favour of the plaintiff agreeing to sell the plaint schedule property for a consideration of Rs.3,350/- per cent for the total extent of land found at the time of measurement. The agreement acknowledged the receipt of Rs.50,000/- towards consideration

as advance from the plaintiff on 17.06.1992. The sale deed was to be executed within a period of 10 months from the date of agreement. The plaintiff alleged that he purchased non judicial stamp paper worth Rs.15,000/- on 21.07.1993 and went to the Sub Registry office for getting the sale deed executed. But the defendants did not execute the sale deed and requested for further time till 30.07.1993 saying that, they were unable to find out any convenient property. Thereafter, the time for execution of sale deed was further extended till 30.04.1994. Both the extensions were endorsed in the agreement originally executed on 17.06.1992. Time was sought to be extended for the second time, on the ground that a suit was pending before the Sub Court, Kottayam, wherein there was an interim injunction against alienation of the property. In these circumstances, the plaintiff's mother, claiming to be the power of attorney holder, caused a lawyer notice to be sent to the defendants on 20.04.1994, demanding execution of sale deed on 30.04.1994 and intimating the defendants that the plaintiff's mother would be present in the Sub Registry, Ettumanoor, with balance consideration on 30.04.1994. The plaintiff further alleged that the defendants, though came to Sub Registry office on

30.04.1994, did not execute the sale deed. The plaintiff claimed that he was always ready and willing to perform his part of the agreement. The plaintiff prayed for a decree for specific performance of the contract along with an alternative prayer for return of advance amount of Rs.50,000/- and the value of stamp paper worth Rs.15,000/- together with 18% interest.

4. The defendants filed written statement saying that they were ready to execute the sale deed and they were present in the Sub Registry office on 21.07.1993, 30.07.1993 and also on 30.04.1994. It was further alleged that the plaintiff had purchased the non judicial stamp papers without the consent or knowledge of the defendants and they were not liable to compensate the plaintiff in that respect. It was also alleged by the defendants that the plaintiff was not ready and willing to perform his part of the contract by payment of balance consideration and it was he who wanted extension for execution of sale deed. It was alleged that there was an injunction order from the Sub Court, Kottayam, in I.A.No.2969 of 1992 in O.S.No.746 of 1992, and that in view of the pendency of that suit the plaintiff requested for extension of time for execution of sale deed upto 30.07.1993. It is also stated that the injunction order

was vacated on 10.02.1993, against which C.M.Appl.No.40 of 1993 was filed before the District Court, Kottayam. The defendants alleged that they had sent a reply notice to the plaintiff informing that they were ready to execute the sale deed on 30.04.1994 and they were present in the Sub Registry office on 30.04.1994 for executing the sale deed, as agreed. They had also signed 3 documents as witnesses on that day, registered in the Sub Registry office. At the same time, the plaintiff did not turn up as agreed and was not ready to get the sale deed executed and hence the advance amount paid to them was forfeited by the wilful default of the plaintiff. The defendants further alleged that the plaintiff had sent two mediators to the defendants saying that he will be satisfied with the return of advance money as he could not raise the balance consideration. The defendants resisted the prayer of the plaintiff for return of advance money also.

5. The court below formulated the issue as to the entitlement of the plaintiff to get the decree for specific performance of contract as well as the alternative claim for return of advance money along with value of stamp paper. On behalf of the plaintiff the power of attorney holder was

examined as PW1 and Exts.A1 to A8 were marked. On behalf of defendants, the 1st defendant was examined as DW1 and one Mr.Ravindran Nair was examined as DW2. Exts.B1 to B4 and Ext.C1 commission report were marked.

6. After consideration of the pleadings as well as the evidence on record, the court below found that the plaintiff could not prove their presence before the Sub Registry office, Ettumanoor on 30.04.1994 for payment of balance consideration for getting the sale deed executed, whereas the defendants could prove their presence based on Exts.B1 to B3 documents in which they signed as witnesses on 30.04.1994 in the Sub Registry Office, Ettumanoor. The court below therefore arrived at the conclusion that it was not proper to exercise its discretion in granting the equitable relief for specific performance in favour of the plaintiff. At the same time, the alternative prayer for return of advance amount of Rs.50,000/- paid at the time of agreement was decreed. The plaintiff's claim for the value of non judicial stamp papers was declined seeing that the plaintiff could have got the refund from Government if he was vigilant and that the defendants cannot be made responsible for the loss caused to him for purchase of non judicial stamp papers. The subsequent

claim raised by the plaintiff on the strength of the commission report, for payment of Rs.18,500/- towards value of the trees cut and removed from the plaint schedule property, was also declined observing that there was no such relief claimed in the plaint and moreover the relief of specific performance was not being granted. Thus the court below granted a decree allowing the plaintiff to recover a sum of Rs.50,000/- together with interest @ 12% per annum from the date of suit till date of decree and thereafter @ 6% per annum till realisation from the defendants.

7. Aggrieved by the rejection of the relief of specific performance of the agreement of sale, the appellant has filed this appeal. We heard the learned counsel appearing on both sides and went through the pleadings and evidence on record.

8. The execution of agreement for sale of the plaint schedule property as per Ext.A3 is not disputed by the parties. Endorsements are seen made in Ext.A3 agreement itself extending the time for execution of sale initially to 30.07.93 and thereafter to 30.04.1994. The reason for the first extension, as seen from the endorsement available in Ext.A3 was that the defendants could not find out another convenient property. The

first extension has been made on 17.04.1993, the date on which the 10 months' period originally stipulated was to expire. The second extension is seen made as per another endorsement on Ext.A3 itself to 30.04.1994 on the ground that there is a case pending before the court. At any rate, there is no dispute as to the extension of time for execution of the sale deed till 30.04.1994.

9. From Ext.A1, it is seen that the plaintiff executed a power of attorney on 28.04.1994 at Saudi Arabia, authorising his mother to enter into transactions with respect to the plaint schedule property, etc. The lawyer notice Ext.A5 was sent to defendants on 20.04.1994, at the instance of plaintiff's mother, claiming to be the power of attorney holder, demanding execution of sale deed on 30.04.1994. Ext.A8 pass book of plaintiff's mother with Federal Bank show that sufficient funds for payment of balance consideration, was available as on 30.04.1994. The plaintiff's mother had in Annexure-A5 lawyer notice informed the defendants that they would be present in the Sub Registry on 30.04.1994 with the balance consideration. But no witness is examined or material produced to prove that the power of attorney holder - the mother of the plaintiff, or anybody

else on behalf of the plaintiff, had in fact reported in the Sub Registry office on 30.04.1994, as claimed or to prove any attempt for payment of the balance consideration. At the same time, the defendants were able to establish their presence in the Sub Registry office on 30.04.1994, on the strength of Exts.B1 to B3 documents in which they affixed their signatures as witnesses in those 3 documents executed in that Sub Registry. The power of attorney holder, who caused the lawyer notice to be sent and thereafter filed the suit, ie. the mother of the plaintiff, passed away in the year 1996. It is the plaintiff's brother, the subsequent power of attorney holder, who was examined as PW1. The presence of PW1 or that of the previous power of attorney holder, or of anybody else on their behalf, in the Sub Registry office with balance consideration, as assured in the lawyer notice or claimed in the plaint could not be established by the plaintiff by any legal evidence on record.

10. At the same time, the case put forward by defendants that there was an attempt on the part of the plaintiff to withdraw from the agreement by sending mediators to the defendants demanding the refund of advance money, is supported by the testimony of DW1 and that of DW2, who claimed to be one of the

mediators.

11. Both parties admit that there was a case pending in respect of the plaint schedule property, filed by the legal heirs of the brother of the first defendant, claiming their right over the plaint schedule property and that initially there was an injunction in force. The finding of the court below that extension of time was sought at the instance of plaintiff, in this background cannot be incorrect.

12. It is considering the overall circumstances of the case and the conduct of the parties that the court below came to the conclusion that it was not a fit case for granting the equitable relief of specific performance of contract in favour of the plaintiff. We find that the finding of the court below is perfectly in accordance with law.

13. Mere availability of funds alone, with the plaintiff without any action for getting the sale executed in terms of the agreement, cannot be a ground for granting relief of specific performance of contract. Sri N.Subramanyam, the learned counsel for the appellant relied on a number of decisions in support of his contention to reverse the decree denying the relief for specific performance. The decisions relied on by him are :

i) **Faizal Eroth v. Venkalath Raveendran** [2013 (3) KHC 407],

ii) **Coromandel Indag Products (P) Ltd. v. Garuda Chits and Trading Co. (P) Ltd. v. Garuda Chits and Trading Co.(P) Ltd.** [2011(3) KLT S.N 135 (C.No.139) Supreme Court],

iii) **A.Ramadas Rao v. J.P.Builders** [(2010) 3 MLJ 870],

iv) **Akbar Ali v. Vinod Khanna & Anr.** [2004 (3) CCC 138(SC)],

v) **Satish Chandra v. Saila Bala** [AIR 1978 Calcutta 499],

vi) **Shri Vishwa Nath Sharma v. Shyam Shanker Goela & Anr.** [2007 (3) CCC 67 (Supreme Court)],

vii) **Faujmal v. Nathulal** [AIR 1965 Rajasthan 114],

viii) **Radha Krishna Agarwal v. Krishna Lal** [AIR 2012 Uttarkhand 64],

ix) **Prakash Chandra v. Angadlal** [AIR 1979 Supreme Court 1241],

x) **Prakash Chandra v. Narayan** [2012 SAR (Civil) 481]

and

xi) **Coromandel Indag Products (P) Ltd. v. Garuda Chit & Trading Co.(P) Ltd.** [(2011) 8 SCC 601].

14. **Faizal Eroth v. Venkalath Raveendran** [2013 (3) KHC 407], was a case where relief for specific performance was declined and a decree was granted for return of advance money.

In that case, the respondents had not satisfied the appellants of their valid title to the property, by handing over the title deeds, previous documents, encumbrance certificates, etc. as provided in the agreement. The court found that the appellants were required to prepare the sale deed only after being convinced of the title with reference to the documents produced by the respondents. But in the present case, the appellant could not establish that he had actually reported in the Sub Registry on the crucial day, as assured/demanded in the lawyer notice, whereas the respondents have successfully proved their presence at the relevant time.

15. **Coromandel Indag Products (P) Ltd. v. Garuda Chits and Trading Co. (P) Ltd. v. Garuda Chits and Trading Co.(P) Ltd.** [2011(3) KLT S.N 135 (C.No.139) Supreme Court] was a case where the sale deed was agreed to be executed within a week of the production of income tax clearance certificate. Even after its production, the company sought copies of several documents, that too, after preparation of the draft sale deed was prepared after scrutiny of all the documents by the legal officer. The court found that the documents were again sought only for delaying the sale and that by refusing to pay

balance consideration, the appellant company committed breach of agreement and hence they were not ready and willing to perform their part. Even though in para.20 of the judgment (which the learned counsel for the appellant relied on) it is mentioned that under explanation to Rule 16 (c) of Specific Relief Act, the plaintiff need not actually tender to the defendant or deposit in court any money except when so directed and observed that there is sufficient pleading in the plaint as to readiness and willingness. In para.30 of the judgment, after analysing the evidence on record, the Apex court found that the company was actually not ready and willing to perform its part. Therefore, the dictum laid down in the above case does not in any way support the case of the appellant herein.

16. **Prakash Chandra v. Narayan** [2012 SAR (Civil) 481] was in respect of a case where all the issues were found in favour of the purchaser and suit was decreed initially. But in appeal it was reversed, seeing hardship being caused to the vendor. The appellate court reversed the judgment seeing that no defence as to hardship was brought on record either in pleadings or in evidence and such an issue was never raised or considered. This judgment also does not help the appellant

herein.

17. **Radha Krishna Agarwal v. Krishna Lal** [AIR 2012 Uttarkhand 64] was a case where the execution of agreement itself was denied. The Honourable Supreme Court found that the issue regarding inadequacy of consideration referring to the escalation of land value was raised for the first time before the Honourable Supreme Court, cannot be considered and held that the value of property should be as it existed at the time of execution of agreement.

18. In **Shri Vishwa Nath Sharma v. Shyam Shanker Goela & Anr.** [2007 (3) CCC 67 (Supreme Court)] the suit was decreed even though the defendant alleged that he had withdrawn from the agreement unilaterally saying that there was an impediment for transfer as permission from Land Development Officer was necessary. The Apex court found that such permission was not a condition precedent for decree of specific performance and upheld the judgment and decree passed by the courts below.

19. In **Akbar Ali v. Vinod Khanna & Anr.** [2004 (3) CCC 138(SC), the suit was for specific performance for Rs.1,00,000/-. The contention raised in the appeal was that the agreement was

unconscionable as the price of land shown was much low. The court found that no evidence was left by the parties on that issue and no issue was framed as to value of land.

20. In **A.Ramadas Rao v. J.P.Builders** [(2010) 3 MLJ 870] the defendants resisted the suit saying that the property was mortgaged. The Honourable Supreme Court while confirming the decree passed by the lower courts and appellate judgment, held that law does not enjoin the party seeking specific performance of contract to deposit the amount in court unless directed by the court. In para.45 and 46 of that judgment, the court observed the circumstances under which the relief of specific performance is granted, in the light of Section 20 of the Specific Relief Act. Grant of specific performance is not automatic and is one of the discretions of the court. Para.43 and 45 of the above decision support the case of the appellant herein, in view of the circumstances stated above.

21. We find that the factual circumstances in the cases relied on by the counsel for the appellant are entirely different from the case in hand. In the present case, the court below declined the relief on being satisfied that the plaintiff was not able to establish his claim that he was always ready and willing

to perform his part of the contract, especially on 30.04.1994. The defendants were able to establish that they were present in the Sub Registry office in terms of the assurance made by them to execute the sale deed. The plaintiff does not have a case that defendants failed to take any other steps in furtherance of execution of sale deed as on 30.04.1994. Mere availability of funds in the account alone with the plaintiff will not enable him for grant of a decree for specific performance, in the absence of any material on record to show that he or his representatives actually approached the defendants on 30.04.1994 in the Sub Registry office with the amount towards balance consideration for getting the sale deed executed. The court below has meticulously considered the facts and circumstances of the case and rightly arrived at the decision that it was not a fit case to grant the discretionary relief of specific performance under Section 20 of the Specific Relief Act.

22. The non judicial stamp papers worth Rs.15,000/- purchased on 21.07.1993, is marked as Ext.A4. Even though it was stated that it was purchased on the understanding that the sale deed would be executed on 21.07.1993, there is no material on record to prove the claim of the plaintiff that there was any

understanding that sale deed would be executed on that particular day or that the stamp papers were purchased with the knowledge or consent of the defendants. Admittedly the time stipulated was extended till 30.04.1994, without any objection. There was no reason for the plaintiff to retain the non judicial stamp papers in his custody, without taking any steps for getting its value refunded. Even after the extension of the period for execution of sale deed till 30.04.1994, no steps are seen taken by the plaintiff to get refund of the value of the non judicial stamp papers. Therefore, we find that the court below has rightly rejected the claim for the value of non judicial stamp papers.

In the above circumstances, we find that the appeal is devoid of any merit and hence the same is dismissed. There will be no order as to costs.

Sd/-
T.R.RAMACHANDRAN NAIR
Judge

Sd/-
P.VASHA
Judge

rtr/