

Saramma @ Alice Vs. Varghese

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Court : Kerala

Decided On : Sep-02-2014

Judge : Honourable Mr.Justice T.R.Ramachandran Nair

Appellant : Saramma @ Alice

Respondent : Varghese

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR & THE HONOURABLE SMT. JUSTICE P.V.ASHA TUESDAY, THE 2D DAY OF SEPTEMBER 2014 11TH BHADRA, 1936 RFA.No. 434 of 2004 (B) ----- AGAINST THE

JUDGMENT

AND DECREE IN OS2861998 OF ADDL.SUB COURT,KOTTAYAM APPELLANTS/DEFENDANTS 1 & 2:: ----- 1. SARAMMA @ ALICE W/O.ABRAHAM, AGED ABOUT 53 RESIDING AT SAMUDRALAYA HOUSE NO.37/2291, NEAR P.C. ROAD, KALOOR ELANGULAM VILLAGE, KANAYANNOOR TALUK ERNAKULAM DISTRICT.

2. ABRAHAM, S/O. VARGHESE, NAVY OFFICER, AGED ABOUT 58 RESIDING AT SAMUDRALAYA HOUSE NO.37/2291, NEAR P.C. ROAD, KALOOR ELANGULAM VILLAGE, KANAYANNOOR TALUK ERNAKULAM DISTRICT. BY

ADVS.SRI.S.CHANDRASENAN

SRI.P.K.SOMARAJAN

RESPONDENT(S)/PLAINTIFF:: ----- 1. VARGHESE, AGED54
S/O.MATHAI, RESIDING AT ALUNKAL HOUSE, THOTTAKKADU KARA,
THOTTAKKATTUKARA VILLAGE, CHANGANACHERRY TALUK.

2. ABRAHAM, AGED62 S/O.THOMAS, KUNNEL PUTHENPURAYIL,
CHINGAVANAM MURI, NATTAKOM VILLAGE. R,R2 BY ADV.
SRI.P.R.VENKETESH R,R1 BY ADV. SRI.M.C.CHERIAN R,R1 BY ADV.
SMT.SARAMMA CHERIAN R,R1 BY ADV. SMT.ASHA CHERIAN R,R1 BY ADV.
SRI.E.D.GEORGE R,R1 BY ADV. SRI.P.M.SANEER THIS REGULAR FIRST
APPEAL HAVING BEEN FINALLY HEARD ON0209-2014, THE COURT ON THE
SAME DAY DELIVERED THE FOLLOWING: T.R.RAMACHANDRAN NAIR & P.V
ASHA, JJ.

----- R.F.A No.434 of 2004-B
----- Dated this the 2nd day of September,
2014

JUDGMENT

Asha, J.

Appellants are the defendants in a suit for realisation of money paid in furtherance of a contract for sale, challenging the judgement and decree of the Court of Additional Sub Judge, Kottayam declaring the plaintiffs entitlement to realise a sum of Rs. 2 lakhs with interest from the date of the suit.

2. The facts leading to the case as projected by the plaintiff in the court below are as follows. An agreement was entered into between the plaintiff and first defendant on 18.10.1996, by which the first defendant agreed to sell 12.7205 cents of property in Chingavanam for a sale consideration at the rate of Rs.30,000/- per cent, receiving a sum of Rs.2 lakhs towards consideration on 18.10.1996. The period stipulated for executing sale deed was one and a half months. Plaintiff alleged that though the first defendant promised to measure and fix the boundary of the property, to execute the sale deed, she left for Bangalore and R.F.A No.434

of 2004-B2 then to the ship of merchant Navy, where the second defendant is working and did not return during the period of contract for sale. He was ready and willing to get the sale deed executed within the period stipulated; but the defendants were postponing the matter on lame excuses. On realising that they rescinded the contract, a lawyer notice was sent to the defendants on 17.7.1998 demanding execution of sale deed. The defendants in the reply notice issued on 22.7.1998 informed the plaintiff that a civil case was pending in respect of the property. The plaintiff therefore rescinded the contract as the defendants cheated him. Suit is filed thereupon for refund of advance money paid, stating that he did not commit any breach of contract and was always ready and willing to perform his part.

3. The defendants one and two, in the written statement denied the allegations and stated that they were always ready and willing to perform their part and it was the plaintiff who committed breach of contract. They stated that they were in station and the plaintiff did not turn up with the balance sale consideration or the draft sale deed in terms of the agreement for sale. It was also alleged that the agreement was for sale of her right of the one half of the undivided share in 25 cents and R.F.A No.434 of 2004-B3441 square links of property and there was no provision in the agreement to measure out or demarcate the boundaries. It was also alleged that the agreement was to get the sale deed executed and registered as and when the plaintiff comes forward with balance consideration and draft sale deed, which the plaintiff did not do. There was no suit pending in respect of the property within the period of contract and that the suit filed-O.S9371996 was dismissed on 11.9.1998. The plaintiff turned up with the demand only in the year 1998, much after the expiry of the period of contract, without performing his part, when the suit was pending. However the defendants by their reply notice informed that they were ready to sell the property to the plaintiff. They never cheated the plaintiff, but only informed the factual circumstances. But the plaintiff filed a criminal complaint against the defendants alleging that the defendants cheated him and Crime Number 91/1998 was registered against them, under Sections 415 and 420 of IPC, in the Police Station, Vakathanam which caused serious harassment and humiliation and damage to their reputation in addition to incurring of huge expenditure, as they were compelled to approach the High Court seeking

anticipatory bail. The defendants alleged that huge loss R.F.A No.434 of 2004-B4 was caused to them on account of the breach of contract committed by the plaintiff and they had to sell the property to the additional third defendant for a nominal cost of Rs. 2 lakhs, sustaining a loss of Rs. 1,81,000/-. The defendants raised a counter claim for a decree for realisation of a sum of Rs.2 lakhs along with interest towards the loss caused to them and damages.

4. The plaint schedule property was sold during the pendency of the suit and the purchaser was impleaded as additional third defendant.

5. The issues framed by the trial court were: (i) who has committed breach of contract; (ii) whether the plaintiff is entitled to realise any amount from the defendants one and two and (iii) whether the counter claim of defendants one and two were allowable.

6. The evidence consists of the testimony of plaintiff as PW1, one Philip as PW2, the first defendant as DW1 and additional third defendant as DW2, and the documents marked as Exhibits A1 to A6; B1 to B14 and Exhibit X1 at the instance of the parties. On analysis of evidence, the court below found that it R.F.A No.434 of 2004-B5 was the first defendant who committed breach of contract. The action of the plaintiff was found to be quite natural in view of the contents of the reply notice Exhibit A4 in which the first defendant informed the plaintiff that there was a civil suit pending before a civil court in respect of the property involved. On examination of Exhibit B14 decree, the trial court was of the opinion that the property which was the subject matter of O.S No.937/96, referred to in the reply notice, was not in respect of the property involved in Exhibit A1 contract of sale. Therefore the rescission of contract by the plaintiff was found proper by the trial court, saying that there was breach of contract on the part of the first defendant. The court below also found that plaintiff cannot be found fault with for filing criminal case against the defendants, in view of the reply notice sent by the first defendant referring to the pendency of the civil case in respect of the property. Court below also found that Sri Philip- PW2 had some involvement in the transaction and believed the version of the plaintiff that there was an attempt to clear out and demarcate the property, on instructions by the first defendant. On consideration of

overall circumstances the court below found that the case of the plaintiff was more probable than that of the R.F.A No.434 of 2004-B6defendants 1 and 2. Based on the finding as to the breach of contract committed by the defendants, the court below decreed the suit for realisation of advance amount and dismissed the counter claim of the defendants 1 and 2.

7. The defendants 1 and 2 have filed this appeal as against the decree for realisation of advance amount from them. There is no appeal as against the rejection of counter claim. We heard Sri Chandrasenan and Smt. Asha Cheriyan - the learned counsel appearing for the appellants and respondents respectively and considered their arguments, the pleadings and evidence on record.

8. The execution of the agreement for sale-Exhibit A1 between the plaintiff and first defendant on 18-10-1996 and receipt of a sum of Rs.2 lakhs as advance money towards sale consideration are admitted. Exhibit A1 shows that the first defendant agreed to sell her right over one half of the undivided share in 25.441 cents of property in Survey Number 356/10 in Chingavanam for a consideration at the rate of Rs.30,000/- per cent, within a period of one and a half months from the date of agreement, for which a sum of Rs. 2 lakhs was paid by the plaintiff towards sale consideration. It was further agreed that R.F.A No.434 of 2004-B7the sale deed would be executed as and when the plaintiff pays the balance sale consideration and produces draft sale deed. Therefore the time stipulated in the agreement expired on 3.12.1996. The demand for execution of sale deed is seen to have made as per Exhibit A3 lawyer notice of 17th July, 1998 only. There is no convincing explanation on either side for the silence during the intervening period. According to the plaintiff, the defendants left for Bangalore and to ship well before the expiry of one and a half months from the date of agreement. But according to defendants they were in station and were willing to execute the sale deed. From the deposition of PWs1 and 2 as well as DW1, it is seen that there was some attempt for surveying and demarcating the boundaries of the property etc. But there is no material to indicate that there was any such demand or promise. However the plaintiff did never have a case that he came forward with balance consideration and the draft sale deed in terms of the contract for sale. The demand is seen made only by issuing the lawyer notice Exhibit A3 on 17-7-1998,

to which the defendants 1 and 2, by Exhibit A4 reply notice, intimated their willingness to perform their part. It is true that they informed the plaintiff that there was a civil suit pending R.F.A No.434 of 2004-B8 with respect to the property involved and cautioned him about the risk. From Exhibit B14 decree it is seen that the said suit was filed on 11.12.1996 and was dismissed on 11.9.1998, ie. within 2 months of the reply notice. The defendants have only imparted a relevant information with respect to the subject matter of the contract for sale, which is a statutory duty under Section 55 (1) (a) of the Transfer of Property Act. Allegation of plaintiff was that the defendants did not take any steps to measure out the property and entrust the requisite documents to him towards execution sale deed. But in the contract for sale Exhibit A1, no such provision is seen made. What is agreed by the first defendant in Exhibit A1 is to execute the sale deed and get it registered as and when the plaintiff pays the balance consideration and produces the draft sale deed.

9. From the deposition of plaintiff as well as DW2 Sri Philip, it can be seen that there was some involvement for Sri Philip in respect of the property. The version of plaintiff is that the first defendant entrusted PW2 to clear and demarcate the property but the measurement could not be done as DW3 obstructed them. The testimony of first defendant shows that Sri Philip is a person known to her and he was involved in the R.F.A No.434 of 2004-B9 transaction with the plaintiff. At any rate, there is no convincing explanation on either part for not executing the sale deed in time or for the delay in making the demand for execution of sale deed till July, 1998, when the period stipulated in the contract had already expired in December 1996 itself. However by Exhibit A4 reply notice, while accusing the plaintiff for the breach of contract committed by him, the first defendant expressed her willingness to execute the sale deed. At the same time she cautioned the plaintiff that there is a civil suit pending in respect of the property in question and in case he was willing to take the risk involved, she was prepared to perform her part in accordance with the conditions stipulated in the agreement. From Exhibit B14 decree, it is seen that OS No. 937/96 was filed on 11/12/1996 and was dismissed by judgement dated 11/9/1998. It further shows that the property involved therein was 38 cents of property in Survey Number 356/10 of Nattakam village. The property scheduled in the Exhibit A1 agreement as well as Exhibit B8 sale deed,

by which the first defendant purchased the property from Sri Shaji Paul are also part of the very same 38 cents in Survey Number 356/10 in Nattakam village. Therefore it can be seen that the suit was pending in respect of the property R.F.A No.434 of 2004-B10as on the date on which the reply notice was sent on 22/7/1998. It is also seen that the suit was filed only on 11/12/ 1996 after the expiry of the contract period in Ext.A1 and it was dismissed even before filing of the suit-19/9/1998. The finding of the court below that suit was in respect of some other property is therefore not correct. The first defendant has only disclosed a factual information regarding the property involved in the contract. On account of such information imparted, she has only performed a statutory duty on the part of the vendor, prescribed in Section 55 (1) (a) of the Transfer of Property Act, which says that the seller is bound to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware and which the buyer could not with ordinary care discover. The section further provides that an omission to make such disclosures is fraudulent. Therefore the first defendant cannot be found fault with on account of such disclosure.

10. In Exhibit A4 reply notice the first defendant herself has given an option to the plaintiff in respect of the completion of contract. Immediately on receipt of the reply notice, instead of ascertaining the details regarding the suit, the plaintiff filed a R.F.A No.434 of 2004-B11criminal complaint against the defendants before the Judicial Magistrate Court, Changanacherry as Criminal MP No.6119/1998 and an FIR was registered against the defendants under Section 420 as per Exhibit B2 on 16/8/1998 on being referred to the Police Station under Section 156 (3) of the Criminal Procedure Code, on account of which the Policeman came to the defendant's house at Ernakulam to apprehend them. The defendants approached this Court in CrI.M.C No.4184/1998 and they were granted anticipatory bail based on Exhibit P5 order dated 27.08.1998. Exhibit B2 shows that the investigation was closed on 22/11/ 1998. After filing of the suit, the plaintiff filed an Insolvency Petition also, against the 1st defendant and DW3, which was later dismissed as withdrawn. However the appellant admits that the respondents are financially well off and they were never in need of raising funds out of the sale proceeds of their property. The suit is filed claiming refund of advance amount, alleging that the

defendants committed breach of contract.

11. Whether disclosure of factual circumstances to the intending buyer will amount to cheating and whether the respondent is entitled to advance money, are the questions to be R.F.A No.434 of 2004-B12 considered. In the light of the above pleadings and evidence on record we are unable to agree with the finding of the trial court that it is the defendant who committed breach of contract. What the defendant has done is that she informed the plaintiff that there is a suit pending in respect of the property at the time of sending reply notice, which is factually correct as can be seen from Exhibit B14 decree. As contended by the learned Counsel for the appellants, an omission on the part of the 1st defendant to disclose the pendency of suit involving the property covered by Ext.A1 agreement would have amounted to a fraudulent act under S.55(1)(a) of T.P.Act. There is no explanation for the plaintiff to wait up to 17.7.1998 to issue a lawyer notice despite the expiry of the contract period for sale as early as on 3.

12. 1996. Therefore we are of the view that it was the plaintiff who committed breach of contract.

12. Now the issue to be considered is whether the plaintiff is entitled to a decree for refund of the advance money. As can be seen from the reply notice Exhibit A4, the first defendant cautioned the plaintiff of the risk involved in purchasing the property during the pendency of suit and gave an option to the plaintiff in the matter of purchase i.e either to R.F.A No.434 of 2004-B13 proceed with the contract or withdraw from it, despite expiry of the contract period. The point which arises for consideration is whether the 1st defendant is entitled to retain the advance amount received/whether the plaintiff is entitled to refund of advance amount; in case the 1st defendant is allowed to retain the amount of two lakhs with her, whether it would be an unjust enrichment. She has been retaining the amount with her ever since 18.

10. 1996, based on Exhibit A1 agreement. On 23.7.1998 she has given the freedom to the plaintiff to repudiate the contract. The defendant did not have any claim towards the advance amount even at that time. Therefore in case she is allowed to retain the advance amount with her, it will amount to unjust enrichment.

In Exhibit A1 agreement there is no provision for forfeiture of advance amount. The learned counsel for the appellants Sri Chandrasenan argued that the defendants 1 and 2 were not liable to return the advance amount because there was no breach of contract on their part and they continued to be willing to perform their part of the agreement during the contract period as well as thereafter as evident from the reply notice and the depositions and that the sale deed could have been executed, without incurring any risk because the suit R.F.A No.434 of 2004-B14 referred to in reply notice was already dismissed as early as on 11.09.1998. Instead of ascertaining the details regarding the suit, the plaintiff immediately filed a criminal complaint against defendants 1 and 2 unnecessarily and went even to the extent of filing insolvency petition against them. He pointed out that the plaintiff when entered the box admitted that defendants 1 and 2 were financially well-off with innumerable assets and they would not have been in need of any funds out of the sale of the property in question. In the above circumstances, the learned counsel submitted that plaintiff is not entitled to any relief from this court and the advance money paid by him was not liable to be refunded to him.

13. On the other hand Smt.Asha Cheriyan, the learned counsel appearing for the respondent argued that there was no provision for forfeiture of advance amount, in the agreement. Ever since the execution of Exhibit A1 agreement on 18.10.1996, the 1st defendant was retaining the advance amount of Rs.2 lakhs with her. When the contract for sale could not be materialised, whoever may be on default, retention of the advance amount will amount to unjust enrichment. She pointed out that in Ext.A1, there was no provision for forfeiture of R.F.A No.434 of 2004-B15 advance amount and therefore plaintiff was entitled to get back the same, on failure of the contract. In support of her contention she relied on the judgement Kannan Menon Vs Kuttikrishna Menon [1962 KLJ257 and argued that the defendants were liable to restore the benefit received out of the contract.

14. In that case the parties had agreed for a sale and purchase of suit property for a sum of Rs.6,500/-. A sum of Rs.100/- was spent at the time of execution of agreement on condition that the remainder shall be paid on execution of sale deed within a week thereof. The sale did not take place within the stipulated period. The

buyer thereupon filed suit for advance money and for damages for breach of contract. The vendor attributed breach of contract to the buyer and claimed certain damages from him. The trial court decreed return of advance money to the buyer while dismissing the suit filed by the vendor for damages. On appeal the decrees were reversed decreeing damages to the vendor besides a declaration that the advance paid has been forfeited. In the appeal before this Court it was held that any payment that formed part of the purchase money at the time of contract for sale, must, even if the blame for its breach is on the buyer, be refunded to the buyer. In paragraph 2 R.F.A No.434 of 2004-B16 of the judgement this court observed as follows: "xxxx The initial deposit of one fourth of the purchase money was clearly a deposit of earnest which will be given credit to in the purchase money if the sale was completed. To this extent it partakes the nature of part payment of the purchase money itself. A payment by way of earnest deposit is primarily one of security for the performance of the contract, liable to be forfeited on breach thereof while a mere prepayment of part of purchase money is liable to be refunded if the sale does not take place. The learned commentator Mulla on his work on Transfer of Property Act, 4th Edition at page 319, referring to the provisions of section 55 (6) (b) observes; "If the buyer improperly refuses to accept he loses his charge (for the purchase money). But although the buyer loses his chance the seller has no right to retain any instalments of price that have been paid, unless that has been paid as deposit or earnest." It was therefore held that the advance money - paid at the time of contract for sale, must even if the blame for its breach is on the buyer, be refunded to the buyer. This court found that the contentions for the claim to retain the advance paid towards purchase money was not supported by the provisions in the agreement for sale executed by the parties and the money paid in advance cannot be treated as an earnest or deposit by way of security for the performance of contract and hence the same R.F.A No.434 of 2004-B17 was liable to be refunded. The rights and liabilities of buyer and seller are provided in Section 55 of the Transfer of Property Act. Section 55 (6)(b) of the Act reads as follows: "S. 55 - Rights and liabilities of buyer and seller - In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-

Xxxxxxxxxxxxxx (6) The buyer is entitled - xxxxxxxxxxxx (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." 15. In the present case the receipt of advance money of Rs.2 lakhs at the time of execution of contract for sale is admitted. There is no proper explanation from either side for not executing the sale during the contract period. At any rate, the respondent has not taken delivery of it within or after the contract period. There is no material to show that any demand R.F.A No.434 of 2004-B18 was made for execution of sale during the contract period and up to July 1998, till the notice was issued. The respondent has rescinded the contract, on getting information from the appellants regarding the original suit involving the property and the risk involved in the purchase. Therefore the action of the respondent in rescinding the contract on receipt of such information from the reply notice in July 1998, cannot be said to be wholly improper. Even if he cannot claim a charge on the property, towards the advance amount paid, the appellants / vendors cannot have any right to retain the advance amount paid by the respondent/purchaser, even in such circumstances, as there is no provision of law which enables the appellants to retain the same. Even assuming that the respondent improperly declined to accept delivery, the appellants do not get any right to claim the advance money paid by him at the time of entering into the contract, in the absence of any provision for the same in Exhibit A1. The provisions under section 55 of the Transfer of Property Act do not provide for retention of advance money by the vendor in the event of any breach on the part of the purchaser. R.F.A No.434 of 2004-B1916. The appellants had a case in the written statement that heavy loss was caused to them, on account of the breach of contract by the respondent and on account of the criminal proceedings initiated against them and they raised a counter claim for a decree for realisation of Rs.2 lakhs from the respondent towards the loss thus caused and for damages. The courts below found that there is no evidence to substantiate those

claims and dismissed the counter claim. Those findings and conclusion are not challenged by the appellants. On that ground also, the appellants cannot have any claim for retaining any part of the advance sale consideration. In the above circumstances, we find force in the contention raised by the learned counsel for the respondent. The decree granted by the court below is therefore not liable to be disturbed, though on different grounds, as discussed above. Hence we dismiss the appeal. There shall be no order as to costs. T.R.RAMACHANDRAN NAIR Judge P.V.ASHA Judge rtr/ Subsequent to the pronouncement of the judgment, the R.F.A No.434 of 2004-B20learned counsel for the appellants sought orders for releasing the bank guarantee which was furnished on direction from this Court at the time of admission. It is therefore ordered that the bank guarantee furnished by the appellants will be released to them. Sd/- T.R.RAMACHANDRAN NAIR Judge Sd/- P.V.ASHA Judge rtr/ /true copy/ P.S to Judge

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