

Shibu vs Rajeesh

Shibu vs Rajeesh

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Court : Kerala

Decided On : Feb-08-2024

Judge : Honourable Mr. Justice a. Badharudeen

Appeal No. : RSA/481/2023

Appellant : SHIBU

Respondent : Rajeesh

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A. BADHARUDEEN
THURSDAY, THE 8TH DAY OF FEBRUARY 2024 / 19TH MAGHA,
1945 RSA NO. 481 OF 2023 AGAINST THE JUDGMENT AND DECREE
IN A.S.NO.3/2019 OF SUB COURT, OTTAPPALAM ARISING OUT OF
JUDGMENT AND DECREE IN O.S.NO.119/2015 OF MUNSIF
MAGISTRATE COURT, PATTAMBI
APPELLANT/RESPONDENT/PLAINTIFF: SHIBU AGED 50 YEARS S/O.
SANKUNNI, PANTHARAKKAPARAMBIL HOUSE, KANNANOOR,
THRITHALA P.O., PALAKKAD DISTRICT,, PIN - 679534 BY ADVS.
SANTHEEP ANKARATH P.ANIRUDHAN
RESPONDENT/APPELLANT/DEFENDANT: RAJEESH AGED 35

YEARS S/O. RAVEENDRAN, PANDAKKAL VEEDU, MARUTHUR AMSOM, KODALUR DESOM, PATTAMBI TALUK, PALAKKAD DISTRICT, PIN - 679306 BY ADVS. A.S.DILEEP P.BINOD K.Y.SUDHEENDRAN SUSEELA DILEEP SUDEEP ARAVIND PANICKER HARITHA HARINATH K.N.HARISHANKAR THIS REGULAR SECOND APPEAL HAVING COME UP FOR HEARING ON 08.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
R.S.A.NO.481 OF 2023 2

JUDGMENT CR

Dated this the 8th day of February, 2024 This Regular Second Appeal arises out of decree and

judgment in A.S.No.3/2019 on the files of the Subordinate

Judges Court, Ottapalam, dated 30.3.2023 and the appellant is the respondent in the above appeal and the plaintiff in O.S.No.119/2015 on the files of the Munsiff Court, Pattambi.

2. Heard the learned counsel for the appellant/plaintiff as well as the respondent/defendant.
3. I shall refer the parties in this appeal as 'plaintiff' and 'defendant', for convenience.
4. As per order, dated 14.7.2023, my learned predecessor admitted this appeal as under: Admit on the substantial questions of law framed in the memorandum of appeal. Issue notice by speed post returnable in two weeks to the respondent.
5. Since Section 100 r/w Order XLII of the Code of Civil Procedure (for short, 'the C.P.C.' hereinafter) mandates formulation of substantial questions of law by the second R.S.A.NO.481 OF 2023 3 appellate court to admit an appeal, substantial questions of law are formulated as under: 1) Whether the first appellate court ignored

presumption under Section 114(e) of the Indian Evidence Act, 1872, while holding that, since the plaintiff did not give evidence in support of execution of Ext.A1 agreement, the execution of the same not proved, eschewing the evidence of PW1 and DW1? 2) Whether law mandates an attesting witness to an agreement for sale as per Section 68 of The Indian Evidence Act, 1872 or under any other provisions?

6. Originally, suit was filed for specific performance of

contract by the plaintiff and it was contended before the trial court that the defendant executed a sale agreement on 31.12.2014, in favour of the plaintiff, agreeing to sell the plaint schedule properties at the rate of Rs.90,000/- per cent and he received Rs.6 Lakh, as advance. The date of performance was fixed on 30.4.2015. But, the defendant failed to execute the sale deed, even though the plaintiff has been ready and willing to execute the document by performing his part of contract. R.S.A.NO.481 OF 2023 4 Accordingly, suit for specific performance of contract was filed. Alternative relief for refund of advance money also was sought for.

7. The defendant appeared, filed written statement and

denied the contentions in the plaint. According to the defendant, the defendant did not sign the sale agreement with his consensus and the same was created fraudulently by deceiving the defendant, at the time of execution of a sale deed in favour of Smt.Leena, who is the sister of the plaintiff, as on 31.12.2014 and registered on 1.1.2015. It was also contended by the defendant that, agreement for sale No.3/2015 of Pattambi SRO, was signed by him, as a result of deception practised by the plaintiff.

8. The trial court ventured the matter. PW1 was examined and Exts.A1 to A5 were marked on the side of the plaintiff. DW1 was examined and Exts.B1 and B2 were marked on the side of the defendant.

9. In this matter, the plaintiff took a stand before start of trial that the defendant had to begin the evidence in view of the mandate of Order XVIII Rule 1 of the C.P.C., wherein, it is R.S.A.NO.481 OF 2023 5 provided as under: 1. Right to

begin.-The plaintiff has the right

to begin unless the defendant admits the facts

alleged by the plaintiff and contents that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Accordingly, an order was passed by the learned Munsiff, holding that the defendant had to begin the evidence and accordingly, the matter posted for evidence. Challenging the said order, O.P.(Civil) No.2497/2017 had been filed before this Court and as per judgment in the above O.P.(Civil), even though this Court found in paragraph No.6 that 'prima facie, this Court is of the view that the reasonings of the trial court as reflected in the impugned Ext.P8 order are not tenable', in paragraph No.7, this Court ordered as under:

7. Sri.Santheep Ankarath, learned counsel for the respondent/plaintiff would submit on the basis of instructions of his party that "plaintiff is not intending to lead evidence as the disputed document in question is a registered document which has the benefit of Sec.140 of the Indian Evidence Act and R.S.A.NO.481 OF 2023

6

that the plaintiff may be given opportunity to adduce rebuttal evidence after the completion of the evidence of the defendant." In the light of the specific stand now made clear by the respondent/plaintiff, it is not necessary for this Court to render any final opinion on the above said aspect mentioned hereinabove. Accordingly, as noted hereinabove, the plaintiff is having the right to take such a stand. Accordingly, it is ordered that the observations and findings made by the trial court in Exhibit-P4 order dated 3.8.2017 will stand superseded by recording the abovesaid undertaking of the plaintiff as mentioned hereinabove. In the light of the said specific stand so made clear by the respondent/plaintiff, it is for the defendant to lead his evidence and thereafter the trial court will grant an opportunity to the respondent/plaintiff to adduce rebuttal evidence after

completion of evidence of the defendant. The impugned Exhibit-P4 order will stand modified as directed herein above.

10. Anyhow, the judgment in O.P.(Civil)No.2497/2017 is

not challenged at all and accordingly, in this matter, the defendant got examined as DW1 first and thereafter, one among the witnesses who put signature in Ext.A1 at the time of registration, got examined as PW1. R.S.A.NO.481 OF 2023 7

11. On appreciation of evidence, the trial court disallowed the prayer for specific performance of contract, while granting decree for return of advance amount as under:

1. The prayer for specific performance of contract is disallowed.

2. The defendant shall pay Rs.6,00,000/-

(Rupees Six lakh only) to the plaintiff along with interest at the rate of 12% from 31/12/2014 till the date of decree and 6% from the date of decree till realisation.

3. Defendant shall also pay the cost of the suit to the plaintiff.

12. When the matter was taken in appeal by the defendant, the first appellate court reversed the verdict of the trial court and dismissed the suit. The reasons for the first appellate court to upset the finding of the trial court are mainly

two fold. It was found by the first appellate court that PW1 never disclosed about Shibu, paying consideration to Rajeesh and no other evidence adduced to prove passing of advance consideration. It was also pointed out by the appellate court in paragraph No.13 that, 'Role of PW1 in Ext.A1 is that of an identifier. Since Ext.A1 is a document required to be attested,

R.S.A.NO.481 OF 2023 8 examination of attesting witness in proof of execution is necessary under Section 68 of the The Evidence Act when execution is denied. Accordingly, the first appellate court found that, execution of Ext.A1 was vitiated by misrepresentation, lack of free consent and without passing of consideration. Consequently, upsetting the finding of the trial court, the appeal was allowed and

suit was dismissed.

13. During chief examination of the defendant as DW1, he

supported the contentions raised in the written statement. During cross examination, DW1 had given evidence that he studied upto Plus Two and Ext.B1, whereby, he transferred his right over 3 cent of property in favour of Smt.Leena, is pertaining to the property he purchased. He also deposed that, he is familiar with the procedure regarding registration of sale agreements as well as execution of sale deed. He also stated that, Ext.B1 is a valid document. At the same time, he added that, 3 cent of property was sold as Ext.B1 because of compulsion. Again he stated that, he did not have a case that Ext.B1 is a void document. When attempt was made to mark Exts.A2 and A3 documents, prior title deeds in relation to the

R.S.A.NO.481 OF 2023 9 property mentioned in Ext.A1, marking of the same was opposed and the same got marked subject to objection. According to DW1, he had handed over Exts.A2 and A3, when the plaintiff, who is his father's brother, wanted to see the

same. He admitted his signature in Ext.A1, which is a registered document. When he was asked about the writings and photographs in Ext.A1 at the time when he signed, his answer was that, he did not see the same. He added further that, he put signature in Ext.A1 not willfully and it was executed by suppressing facts. But, when he was asked, who did so, his answer was that, he did not remember. A pertinent question was asked with reference to the witnesses mentioned in Ext.A1 to the effect that, whether the defendant put signature in any document, where the witnesses in Ext.A1 acted as witnesses, DW1 admitted execution of such a document. But, DW1 did not mention any such document apart from Ext.A1.

14. From the evidence of DW1, admitting the signature in Ext.A1 and also admitting execution of a document, signed by the witnesses mentioned in Ext.A1, the inference to be drawn is R.S.A.NO.481 OF 2023 10 that, DW1, who executed Ext.A1 sale agreement, that too, on the date of execution of Ext.B1, practically supported execution of Ext.A1. Anyhow, after examination of DW1 in view of the

order in O.P.(Civil)No.2497/2017, one Manikandan got

examined as PW1. During chief examination, when Ext.A1 was shown, he stated that he is familiar with Rajeesh and Shibu, mentioned in Ext.A1 and in the registration portion of Ext.A1, he signed as a witness. Ext.A1 is a sale agreement and he participated in the process of its preparation and registration. He also stated that, he had witnessed signing of Ext.A1 by Rajeesh (defendant) and Shibu (plaintiff) before the Sub

Registrar. He also stated that, before signing Ext.A1, the Registrar asked Rajeesh and Shibu about the contents of the document and understood that, they are aware of the contents of the document. His evidence further is that, he could depose about the contents of the agreement. He deposed further that the document writer read over the same. His evidence further is that Ext.A1 was written by Prakasan and he witnessed the same. His evidence further is that writing started at 10.00 a.m. and 1 hours taken to complete the same. He deposed that

R.S.A.NO.481 OF 2023 11 Rajeesh, Shibu, two cousins of Shibu, were there at the office and he understood the contents of the document during this time.

15. Referring the evidence given by PW1 to the effect

that he had witnessed writing of Ext.A1 by the scribe, the learned counsel for the defendant argued that, since Ext.A1 is a document generated by DTP, the evidence of PW1 asserting that Ext.A1 was written by the scribe, is not believable and the same doubts the presence of PW1 at the office of the scribe. The evidence of PW1 read as a whole, it is decipherable that PW1 referred about preparation of Ext.A1 stating that he had witnessed writing of the same in the presence of the parties and the witnesses in Ext.A1. No other inference forthcoming to disbelieve PW1, who is a signatory to Ext.A1, whose evidence failed to be shaken during cross examination. Apart from that, no question asked to PW1 suggesting that Ext.A1 is a document generated by DTP. Therefore, this contention found to be not sustainable and is repelled. In fact, PW1 was cross examined, pointing out registration of criminal case as C.C.No.2096/2015 against

the plaintiff and PW1 as the 8th accused in the case. In

R.S.A.NO.481 OF 2023 12 this regard, it is submitted by the learned counsel for the plaintiff that the said case was quashed by this Court and the said submission is not disputed by the other side.

16. As per Section 114(e) of the Indian Evidence Act,

1872, judicial and official acts have been regularly performed and in such circumstances, the Court may presume the exercise of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the

facts of the particular case. Apart from that, Ext.A1 is a

registered document, admittedly signed by the defendant and his case is that, it was got executed at the time when Ext.B1 was executed, by deception. In this connection, the learned counsel for the plaintiff given emphasis to Sections 58 to 60 of the Registration Act, 1908. Sections 58 to 60 read as under:

58. Particulars to be endorsed on

documents admitted to registration.-(1) On every document admitted to registration, other than a copy of a decree or order, or a copy sent to a registering officer under section 89, there shall be endorsed from time to time the following particulars, namely:- R.S.A.NO.481 OF 2023 13

(a) the signature and addition of every

person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(b) the signature and addition of every person examined in reference to such document under any of the provisions of this Act; and

(c) any payment of money or delivery of

goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

(2) If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal.

59. Endorsements to be dated and signed

by registering officer.-The registering officer shall affix the date and his signature to all endorsements made under sections 52 and 58, relating to the same document and made in his presence on the same day.

60. Certificate of registration.-(1) After such of the provisions of sections 34, 35, 58 and 59 R.S.A.NO.481 OF 2023 14

as apply to any document presented for registration have been complied with, the registering officer shall endorse thereon a certificate containing the word registered, together with the number and page of the book in which the document has been copied.

17. Though it is argued by the learned counsel for the

defendant that, when undue influence and coercion, are alleged by the defendant in execution of a document, presumption under Section 114(e) of the Indian Evidence Act, 1872, could not be applied. This is a case, in which, Ext.A1, a registered document was executed at the time of execution of Ext.B1, an admitted document. The specific case of the plaintiff is that, Exts.A2 and A3 documents are photocopies of the title deeds in relation to the property referred in Ext.A1, handed over at the time when the agreement was executed. Though it is argued by the learned counsel for the defendant that those documents were entrusted with the plaintiff, the same was entrusted, considering the relationship with the plaintiff, since the plaintiff is the brother of the defendants father and the same could not be read as one in support of execution of Ext.A1, this

R.S.A.NO.481 OF 2023 15 contention cannot be justified at all. The rationale is when plaintiff produced Ext.A1 sale agreement, along with the copies of title deeds of the property referred in Ext.A1, the same is a vital piece of evidence supporting voluntary execution of Ext.A1. Thus, the evidence available would go to show that the defendant, who was admittedly present before the Sub Registrar for executing Ext.A1 and the process of registration was witnessed by PW1. In such a case, hypertechnical view taken by the first appellate court, ignoring the contents of Ext.A1, on the ground that there was no evidence for passing of consideration, cannot be sustained. In the instant case, the presumption under Section 114(e) of the Indian Evidence Act, 1872, is available to the plaintiff, who built up his case on the strength of a registered sale agreement, which is proved.

18. The learned counsel for the defendant submitted that

admission of signature in a document does not amount to its execution and in this connection, he has placed decision of the Apex Court in *Veena Singh (Dead) Through LR v. The District Registrar/Additional Collector (F/R) And Another* reported in [(2022) 7 SCC 1]. In paragraph No.57 of the R.S.A.NO.481 OF 2023 16 above judgment, the Apex Court considered earlier decisions on this point and held in paragraph No.57 as under:

57. The "execution" of a document does not

stand admitted merely because a person admits to having signed the document. Such an interpretation accounts for circumstances where an individual signs a blank paper and it is later converted into a different document, or when an individual is made to sign a document without fully understanding its contents. Adopting a contrary interpretation would unfairly put the burden upon the person denying execution to challenge the registration before a civil court or a writ court, since registration will have to be allowed once the signature has been admitted.

In the same decision, the Apex Court adverted Section 74 of the Registration Act, 1908 and held in paragraph Nos.63 and 64 as under:

63. Section 73 of the Registration Act

envisages that an application may be submitted to the Registrar by a person in order to establish their rights to have a document registered, in a situation where the Sub-Registrar has refused to register the document on the ground that the person by whom it purports to have been executed has denied its R.S.A.NO.481 OF 2023 17

execution. Section 74 then lays down the procedure which is to be followed by the Registrar, which contemplates an enquiry by the Registrar into whether the document has been executed and whether requirements of law for the time being in force have been complied with on the part of the applicant or the person presenting the document for registration. When the twin requirements of clauses (a) and (b) of Section 74 are found by the Registrar to have been fulfilled, sub-Section (1) of

Section 75 provides that the Registrar shall order

the document be registered. Sub-Section (4) of Section 75 stipulates that for the purpose of the enquiry under Section 74, the Registrar may summon and enforce the attendance of witnesses and compel them to give evidence as if he is a civil court. The Registrar is also empowered to impose the obligation of paying the costs of the enquiry on a party, and such costs are to be recovered as if they have been charged in a suit under the CPC. Thus, sub-Section (4) of Section 75 incorporates a deeming fiction from two perspectives - first, in empowering the Registrar to summon and enforce the attendance of witnesses and for compelling them to give evidence "as if he were a civil court"; and second, in awarding costs which become recoverable "as if they have been awarded in a suit" under the CPC. The process which is conducted by

the Registrar for the purpose of an enquiry under Section 74 cannot be equated to the powers of the civil court, though certain powers which are entrusted to a civil court are vested with the Registrar by the provisions of Section 75(4). A quasi-judicial function is entrusted to the Registrar for the purpose of conducting an enquiry under Section 74. Where the Registrar refuses to register a document under Sections 72 or 76, no appeal lies against such an order. Section 77, however,

provides that when the Registrar refuses to order

the document to be registered, any person claiming under such document or its representative, assign or agents may institute a suit before the civil court within the stipulated time for a decree directing that the document shall be registered. It is thus clear that the Registrar, when he conducts an enquiry under Section 74, does not stand constituted as a civil court. The enquiry before the Registrar is summary in nature. The decision of the Registrar in ordering document to be registered, or for that matter in refusing to register a document, is not conclusive and is amenable to judicial review.

64. Therefore, in a situation where an

individual admits their signature on a document but denies its execution, the Sub-Registrar is bound to refuse registration in accordance with Sections 35(3)(a) of the Registration Act. R.S.A.NO.481 OF 2023 19 Subsequently, if an application is filed under Section 73, the Registrar is entrusted with the power of conducting an enquiry of a quasi-judicial nature under Section 74. If the Registrar passes an

order refusing registration under Section 76, the

party presenting the document for registration has the remedy of filing a civil suit under Section 77 of the Registration Act, where a competent civil court will be able to adjudicate upon the question of fact conclusively.

19. Apart from this, a Division Bench judgment of this

Court in *Mary v. Leelamma* reported in [2020 (4) KHC 176] has been placed, to contend that, in the matter of proof of undue influence, a statutory presumption is created, whereby, transaction appears to be unconscionable, burden to prove that there was no undue influence shall be upon the party who was in a position to dominate the will of the other.

20. Insofar as the legal position to the effect that mere

admission of signature in the document does not prove its execution, admission of signature would go a long way in the process of execution, that too, made before the Sub Registrar Office along with execution of an admitted document.
R.S.A.NO.481 OF 2023 20

21. In the case at hand, going by the written statement

filed by the defendant, undue influence is not the ground raised in the written statement and in the written statement, it was contended that Ext.A1 got executed at the time of Ext.B1 by deception, without the knowledge of the defendant and therefore, undue influence could not be found in this matter. Another contention was that, the defendant got borrowed Rs.1,00,000/- from the plaintiff on 2.1.2014 as loan, on undertaking to repay the same along with interest within a

period of one year. At the time of borrowing of the said amount, the defendant entrusted one unsigned cheque leaf and two unsigned stamp papers worth Rs.100/-. No other documents were entrusted. The story of entrustment of unsigned cheque and unsigned stamp papers, is not digestible procedure, since nobody would accept unsigned documents, for which no purpose. Further contention was that the plaintiff realised exorbitant interest and the defendant failed to pay the interest. It was at this juncture, he had executed sale deed (Ext.B1) in favour of the sister of the plaintiff. He also contended that, Ext.A1 agreement was not executed by the R.S.A.NO.481 OF 2023 21 defendant voluntarily. The further contention was that, Ext.A1 got executed by deceiving the defendant.

22. As I have already pointed out, during examination of

the defendant as DW1, he admitted his signature in Ext.A1 and he also admitted that he executed document, where the witnesses in Ext.A1 also shown as witnesses and thereby, it is found that the defendant, who executed Ext.A1 at the time of Ext.B1, willfully disputing the same, without any bona fides. Therefore, the contention raised by the learned counsel for the defendant that Ext.A1 got executed by undue influence, is contrary to the contentions raised in the written statement. Therefore, the same shall not succeed. Similarly, the difference in the matter of balance consideration shown in the notice and in the plaint is of no much significance, though the same also is pointed out by the learned counsel for the defendant.

23. It is shocking in note that the first appellate court had

gone to the extent of saying that Ext.A1 is a document, which would require examination of attesting witnesses in proof thereof under Section 68 of the Indian Evidence Act, 1872. On reading Section 68, it has been provided as under:
R.S.A.NO.481 OF 2023 22

68. Proof of execution of document

required by law to be attested.--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: [Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

24. On reading Section 68 of the Indian Evidence Act,

1872, on no stretch of imagination it could be held that an agreement for sale is a document which would require mandatory attestation by witnesses. None of the provisions of the Indian Contract Act mandate compulsory attestation of a sale agreement, though law does not prohibit attesting witnesses to a sale agreement. Therefore, the first appellate court, without understanding the legal provisions, held that Ext.A1 sale agreement would require mandatory attestation.

R.S.A.NO.481 OF 2023 23 This legal position is fairly conceded by the learned counsel for the defendant also.

25. On re-appreciation of the evidence and materials available, it could be gathered that the plaintiff, who relegated the right to begin the evidence of the defendant in view of the

judgment in O.P.(Civil) No.2497/2017, after completion of the

evidence of DW1, examined PW1 to prove the execution of Ext.A1. A cumulative reading of Exts.A1 to A3 along with the evidence of PW1 and DW1, the execution of Ext.A1 stands proved and thereby, its contents also stands proved. The learned Munsiff rightly found so. However, the learned Munsiff was not inclined to grant discretionary relief of specific performance, but was inclined to grant relief of return of

advance money alone. I do hold that the learned Munsiff rightly appreciated the evidence and granted the alternative relief. But, the first appellate court took hypertechnical view, without understanding the legal position, while appreciating the evidence and perversely appreciated the evidence to hold that the execution of Ext.A1 was not proved. Therefore, the decree and judgment of the first appellate court would require R.S.A.NO.481 OF 2023 24 interference.

26. This Regular Second Appeal is allowed. Accordingly, the decree and judgment in A.S.No.3/2019, stand set aside and the trial court decree and judgment stand restored.

Considering the nature of contentions, the appellant is held

entitled to the cost through the proceedings. The direction from the first appellate court to issue communication to the Registrar, Pattambi to make an entry in the register that the deed No.3/2015, dated 01.01.2015 is cancelled, also is interfered and recalled. If it is already informed, forward a copy of this judgment to the Sub Registrar, Pattambi, to record the finding of this Court in this regard. Sd/- A. BADHARUDEEN JUDGE Bb

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