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Anna Peter vs Sobha V.S.

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Court : Kerala

Decided On : May-09-2023

Judge : Honourable Mrs. Justice Mary Joseph

Appeal No. : CO/123/2014

Appellant : Anna Peter

Respondent : Sobha V.S.

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH TUESDAY, THE 9TH DAY OF MAY 2023 / 19TH VAISAKHA, 1945 RFA NO. 399 OF 2014 AGAINST THE JUDGMENT AND DECREE DATED 06.03.2014 IN O.S NO.504/2007 OF II ADDITIONAL SUB COURT,THIRUVANANTHAPURAM. APPELLANT/PLAINTIFF: SHOBHA.V.S. AGED 36 YEARS W/O.AJITHKUMAR, RESIDING AT T.C.11/1535(1), DEVASWOM BOARD JUNCTION, NANTHANCODE, THIRUVANANTHAPURAM. BY ADVS. SHRI.SHANKAR V. SRI.K.SANDESH RAJA RESPONDENT/DEFENDANT:

ANNA PETER D/O.ELIZABETH PETER, W/O.MANIKANTAN NAIR, T.C.8/1295 NEAR CLIFF HOUSE, NANTHANCODE, THIRUVANANTHAPURAM, ALSO AT T.C.14/1561, ARA-79, 'SINDYA', DEVASWOM BOARD JUNCTION, KOWDIAR THIRUVANANTHAPURAM. BY ADVS. SMT.R.BINDU SRI.HARISH GOPINATH SRI.JOHNSON JOSE PANJIKKARAN SRI.R.S.KALKURA SRI.M.S.KALESH SRI.K.KURIAN KOSHY SMT.A.V.PRIYA SRI.SANIL KUNJACHAN THIS APPEAL HAVING COME UP FOR FINAL HEARING ALONG WITH

CO.123/2014 ON 12.07.2021, THE COURT ON 09.05.2023, DELIVERED THE FOLLOWING: -:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE MARY JOSEPH TUESDAY, THE 9TH DAY OF MAY 2023 / 19TH VAISAKHA, 1945 CO NO. 123 OF 2014 AGAINST THE JUDGMENT DATED 06.03.2014 IN O.S NO.504 OF 2007 OF II ADDITIONAL SUB COURT,THIRUVANANTHAPURAM CROSS OBJECTOR/RESPONDENT IN RFA: ANNA PETER, AGED 55 YEARS, D/O.ELIZABETH PETER, W/O.MANIKANTAN NAIR, RESIDINGAT T.C. 8/1295, NEAR CLIFF HOUSE, NANTHENCODE,THIRUVANANTHAPURAM ALSO AT T.C 14/1561, ARA-79, SINDYA DEVASWAM BOARD JUNCTION, KOWDIAR,THIRUVANANTHAPURAM. BY ADVS. SRI.R.S.KALKURA SMT.R.BINDU SRI.HARISH GOPINATH SRI.JOHNSON JOSE PANJIKKARAN SRI.M.S.KALESH SRI.K.KURIAN KOSHY SMT.A.V.PRIYA RESPONDENT/APPELLANT: SOBHA V.S. AGED 38 YEARS W/O.AJITH KUMAR, RESIDING AT T.C. 11/1535 (1),DEVASWAM BOARD JUNCTION, NANTHANCODE, THIRUVANANTHAPURAM - 695 331. THIS CROSS OBJECTION HAVING COME UP FOR FINAL HEARING ALONG WITH RFA.399/2014 ON 12.07.2021, THE COURT ON 09.05.2023,

DELIVERED THE FOLLOWING: -:3:-

MARY JOSEPH, J.

---------- R.F.A. No. 399 of 2014 & C.O No.123 of 2014 ---------- Dated this the 09th day of May, 2023 This appeal is originated from a judgment dated 06.03.2014 of IInd Additional Sub Court, Thiruvananthapuram (for short 'the court below') in O.S.No.504/2007. The Original Suit was filed by the appellant before the court below seeking for specific performance of an agreement for sale.

2. The parties to this appeal will hereinafter be referred to as the plaintiff and the defendant in accordance with their status before the court below.

3. It was averred in the plaint that by virtue of an agreement

for sale executed among the defendant with the plaintiff, plaint B schedule property which is a portion of plaint A schedule property obtained by the defendant by virtue of a Will bearing No.55 of 1969 of SRO Thiruvananthapuram and a release deed bearing No.1990 of 1992 of SRO Pattam was agreed to be sold to the plaintiff for a consideration of Rs.7,00,000/-. Rs.3,25,000/- was received on the

-:4:- date of execution of the agreement for sale itself as earnest money. Plaint B schedule property has an extent of 1 cent from the road to the property belonging to the plaintiff. The time stipulated in the

agreement for payment of balance sale consideration of Rs.3,75,000/- and for getting the sale deed executed in favour of the plaintiff was five months from the date on which the agreement was executed. Though the plaintiff was always ready and willing to pay the balance sale consideration to the defendant and to meet the expenses for execution of the sale deed, the latter preferred a petition before Kerala Women's Commission, Thiruvananthapuram, against the plaintiff's husband on 18.06.2007 alleging that the defendant has never executed an agreement for sale in favour of the plaintiff and seeking to get the alleged agreement for sale returned. The plaintiff was informed by the defendant that she is not willing to

perform her part of the contract. Thereupon, a petition was filed by the plaintiff before the Museum Police Station and for the reason that the issue involved is of civil nature, the petition was closed. Thereafter, a lawyer notice was sent by the plaintiff to the defendant on 03.07.2007 seeking for compliance of the terms and conditions in the agreement for sale. A reply notice was sent by the defendant to the

-:5:- plaintiff on 09.07.2007 stating that she is not bound to comply with

the terms. In the said context the filing of a suit seeking for a direction to the defendant to execute a sale deed in respect of B schedule property on accepting the balance sale consideration of Rs.3,75,000/- within a time period specified by the court was necessitated. A decree for permanent prohibitory injunction and other reliefs were also sought in the suit by the plaintiff.

4. A written statement was filed by the defendant

contending that the plaintiff is not entitled to get the discretionary relief of specific performance on the basis of the alleged agreement for sale, got executed by playing fraud and misrepresenting her that the defendant had never executed the alleged agreement for sale intending thereby to sell the B schedule property and that consensus among herself and the plaintiff was not there. The plaintiff is a neighbour of the defendant and the defendant's mother and sister are residing in a building bearing No.TC 11/1536, BBRA-82 situated in plaint A schedule property, that a good relationship is maintained among herself and the plaintiff, that there were mutual monetary transactions among them, that the defendant was in dire need of money for admitting her son in the Business Administration Course

-:6:-

at TKM Institute of Management, Kollam and also for doing the repair and the maintenance works of the building belonging to her husband. The defendant and her husband promised the plaintiff that they would arrange and advance the required funds by way of loan to be repaid at the convenience of the plaintiff. A sum of Rs.1,00,000/- was borrowed by the defendant from the plaintiff for the

maintenance of the above residential building and Rs.2,25,000/- on 14.03.2007 for admission of her son, without executing any document, in view of the mutual trust they had with each other, that the defendant visited the residence of the plaintiff thereafter and the husband of the plaintiff made her to sign a document which was kept written under the guise that the same is required to be presented before Dhanalekshmi Bank wherefrom the loan is proposed to be availed for the purpose, that the defendant had neither executed any agreement for sale nor entrusted the notarised copy of the release deed to the plaintiff, that the copy of the release deed was obtained from the defendant only for the purpose of production at the plaintiff's husband's bank, that the contents of the document was not read by the defendant as spectacles was not carried by her at the relevant time and therefore signature was affixed on it unknowingly

of the contents, that the plaintiff and her husband informed her that the document is only an agreement which will not affect her interest in any manner, that the defendant informed the Sub Inspector of Police of Museum Police Station that she had not entered into an agreement for sale and no consideration was received by her as stated in the alleged agreement for sale, that the defendant was forced to file

a complaint before the Kerala Women's Commission Thiruvananthapuram, that she never intended the sale of a portion of the land belonging to her, that the witnesses in the alleged agreement for sale are total strangers and having no acquaintance with the defendant, that the extent of property alleged to be sold to the plaintiff will in no way render any use to the plaintiff as the area mentioned in the agreement will not reach upto the property of the plaintiff, that the plaintiff has no manner of right to restrain the defendant from enjoying the plaint schedule property, that she is not bound to perform any part of the alleged agreement for sale under which unfair advantage was gained by the plaintiff, that without exposing material facts, that the plaintiff has approached the court with unclean hands, that the plaintiff has no cause of action and that if the reliefs sought in the suit are allowed in favour of the plaintiff,

-:8:- she will be put to untold hardships and loss and for the reasons the suit is liable to be dismissed.

5. An additional written statement was also filed by the

defendant contending that the alleged agreement for sale was obtained by playing fraud on her and misrepresenting her, that it was obtained by the plaintiff and her husband with the mala fide intention of making illegal gains for herself at the expense of the defendant and thereby caused wrongful loss to the plaintiff, that evenif a pathway is laid as per the terms of the agreement, the same will not in any way enure to the benefit of the plaintiff, since she has another pathway for ingress and egress to her property.

6. On the basis of the above rival pleadings, the court below has raised issues as follows:

1. Whether the suit is maintainable? 2.Whether the plaintiff is entitled to get a decree for specific performance? 3.Whether the prohibitory injunction as prayed for is allowable?

4. Reliefs and costs.

7. To establish their contentions the plaintiff had brought on record oral evidence of herself and three other witnesses as PWs 1 to

4. The defendant adduced oral evidence as DW1. Exts.A1 to A10 were -:9:- marked on the side of the plaintiff and Exts.B1 to B29, on the side of the defendant. Ext.C1 is also marked as the Court Exhibit.

8. The evidence as a whole was appreciated by the court

below and the suit was dismissed. Aggrieved by the dismissal of the suit, the plaintiff is now before this Court as appellant. According to the plaintiff, the court below is erred in not exercising jurisdiction vested on it under Section 20 of the Specific Relief Act, 1963 properly. According to her, the discretionary relief under Section 20 of the Specific Relief Act, ought to have been granted by the court below only to those who approaches the court with clean hands and solely based

on principles of equity.

9. The court below found the contention raised by the

defendant that Ext.A2 agreement was obtained by the plaintiff by fraud and misrepresentation, false. It is further contended that the court below ought to have found that there was no other motorable pathway leading to the property of the plaintiff. According to the plaintiff, if evidence was appreciated by the court below in its proper perspective, it could have understood that the hardships occasioned to the plaintiff on account of non compliance of terms of Ext.A2 agreement is comparatively higher than that would be caused to the

-:10:- defendant on account of compliance of terms of Ext.A2 agreement.

10. According to the learned counsel for the plaintiff, it was

intended by Ext.A2 agreement to provide a pathway upto the property of the plaintiff through the extreme western side of her property and therefore the minute difference in the description in Ext.A2 and in the amended plaint was insignificant. According to him, the court below went erred in arriving at a finding that the plaintiff is disentitled to get return of the advance money. Raising

arguments of the nature, the plaintiff sought for reversal of the

judgment under challenge. The learned counsel has also filed an

application seeking to amend the plaint.

11. The learned counsel for the plaintiff has filed I.A No.02/2021 in the appeal on hand under Order XLI Rule 2 Read with

Order VI Rule 17 and Section 151 of the Code of Civil Procedure

seeking leave of this Court to amend the appeal by incorporating the additional grounds after ground L already there in the appeal memorandum as stated hereinbelow:- "M. The appellant in the alternative is entitled to a decree of refund of a sum Rs.3,25000/- with interest at the rate of 12% from the date of the suit till

realization from the respondent and that the court in this regard ought to have -:11:- meted out the equitable relief once having concluded that the A2 agreement for sale is proved. In this regard the court below ought to have comprehended the correct scope of Section 22(2) of the specific relief Act. N. The court below has failed to raise the material

issues involved in the suit and proceeded to decide the above

suit without framing proper issue and hence the appeal is liable to be allowed by setting aside the judgment and decree and remanding back the same for de novo disposal."

12. Another application was also filed as I.A No.03 of 2021

under Section 22(2) of the Specific Relief Act read with Order VI Rule 17 and Section 151 of the Code of Civil Procedure seeking leave to amend the plaint by incorporating paragraph 9(a) in the plaint after paragraph 9, which reads:

> "The plaintiff is entitled to the relief of specific performance or in the alternative be permitted to recover the advance sale consideration being a sum of Rs.3,25,000/- with interest at the rate of 12% from the date of the suit till realization. This claim is based on equity in case it is found that the plaintiff is not entitled to the relief of specific performance and that in view of the provisions of Section 22(2) of the Specific Relief Act the plaintiff is raising such a claim as an alternate relief. In the relief portion of the plaint after relief (d), relief d(1) was also sought to be added, which reads:- Or in the alternative plaintiff may be permitted to recover the advance sale consideration of Rs.325,000/- with -:12:-

interest at the rate of 12% per annum from the date of suit till realization and allow the same to be realized from the assets of defendant."

13. Counter affidavit has been filed by the defendant/cross

objector in both the applications to the effect that the applications seeking amendment are not maintainable in law or on facts, since those are filed belatedly with ulterior motives, that the lower court had granted enough opportunity to the petitioner for amendment of the plaint, that the relief for return of earnest money having been abandoned by the plaintiff before the trial court he cannot raise a plea thereafter, that the plaintiff cannot club the prayer for return of money, that the evidence tendered to establish payment of consideration under the agreement for sale are highly inconsistent and self defeating, that payment of consideration as such was not proved by the defendant, that the plaintiff if intended to get back the money given to the defendant as loan, a fresh suit has to be instituted based on that cause of action and that the amendment sought will change the character, nature and scope of the suit, that grounds are not raised in the memorandum of appeal with regard to the alternative relief of refund of earnest money and therefore, applications seeking amendment are liable only to be dismissed.

-:13:-

14. Challenging the judgment in O.S No.504 of 2007, the

defendant has also filed cross objection. According to her, court below while answering issue No.1 has found that the agreement for sale relied on by the plaintiff is a valid one and binding on herself as well as the plaintiff. According to her, the said finding is an incorrect one being resulted from an erroneous appreciation of oral as well as documentary evidence. In order to render a finding on the validity of the agreement for sale, the court below has relied on the oral evidence of PWs 2 to 4, who are interested and tutored witnesses and therefore, a conclusion ought to have been arrived at by it that what have been spoken by them are mere falsehood. Apart from that, the court below failed to advert to several discrepancies crept into while tendering evidence by PWs 1 to 4. If evidence was appreciated in the proper perspective, the court below ought to have arrived at a finding

that execution of Ext.A2 was on account of fraud and misrepresentation on the part of the plaintiff that he had never intended to execute the same. The court below ought to have found that one cent of land agreed to be sold by Ext.A2 is

insufficient to serve the purpose of the plaintiff and it could be gathered from that itself that the defendant never intended to sell the same by entering

-:14:- into Ext.A2. According to him, the defendant being an educated lady, her contention that signature was affixed in Ext.A2 without its contents being read is devoid of any basis and the court below did not advert to that properly. It was further contended that sufficient opportunity to adduce evidence to establish fraud played and misrepresentation made by the plaintiff while executing Ext.A2 was

denied to the defendant. For that reason, the judgment under challenge was liable to be set aside and the case be remanded to the court below for fresh trial and adjudication.

15. The learned counsel for the plaintiff has relied on

Ammisetti Chandram alias Ramachandran and others V. Chodasani Suryanarayana [AIR 2003 AP 269] to contend that plea of hardships liable to be caused to the defendant must be established by himself and if he fails to do so, after arriving at a finding of legality and genuineness of Ext.A2, plea of hardships cannot be entertained. It was held that the hardships caused to the defendant must be established by himself. Hardships caused to the 1st defendant on decreeing the suit is not established before the court after a finding is arrived at that Ext.A1 is a document truly executed

and supported by valid consideration. In such a context the -:15:- contentions relating to distress sale and hardships are only to be rejected.

16. Sekaran N. and Another V. C. Rajendran [AIR

2018 Mad.67] was relied on by the learned counsel for the plaintiff to contend that a prayer for refund of the advance sale consideration, evenif not made by the plaintiff, the court is empowered to mould the relief and to issue appropriate direction to the defendant for refund of the advance sale price with a view to render complete justice.

17. Kahini Developers Pvt.Ltd Vs. Mukesh Morarji

Panchamatia & Ors., is an unreported decision relied on by the learned counsel for the plaintiff to draw the attention of this court to the object of the legislature while introducing proviso under Sub Section (2) of Section 22 of the Specific Relief Act, 1963 and the various decisions wherein the Apex Court has interpreted the extent of the protection intended to be granted by the said proviso. Paragraph 9 of the above decision being relevant in the context is extracted hereunder:

" 9. The object of the legislature in introducing the proviso to sub-section (5) of Section 21 and sub-section (2) of Section 22 -:16:-

> was to obviate a multiplicity of proceedings. In Babu Lal vs. Hazari Lal, the Supreme Court noted that the legislature has given ample power to the Court to allow amendment of the plaint at any stage. This, the Supreme Court held, would include even the stage of execution. The Supreme Court also held that a mere contract for sale or for that matter, a decree for specific performance does not confer title on the buyer and that title would pass only upon execution of the decree. While discussing the issue of limitation, the Supreme Court in AIR 1982 SC 818 at para 20 page 825 VBC 8/11 app611.12-6,2 held as follows: If once we accept the legal position that neither a contract for sale nor a decree passed on that basis for specific performance of the contract gives any right or title to the decree-holder and the right and the title passes to him only on the execution of the deed of sale either by the judgment-debtor himself or by the Court itself in case he fails to execute the sale deed, it is idle to contend that a valuable right had accrued to the Petitioner merely because a decree has been passed for specific performance of the contract. The limitation would start against the decree-holders only after they had obtained a sale in respect of the disputed property. It is, therefore, difficult to accept that a valuable right had accrued to the judgment-debtor by lapse of time. S.22 has been enacted only for the purpose of avoiding multiplicity of proceedings which the law Courts always abhor. (Emphasis supplied)

18. Smt.Khamarunnisa Vs. Mudalappa [ILR 2003 KAR 4535] was relied on by the learned counsel for the plaintiff to -:17:-

rest his contention that even without a claim for return of earnest money paid under the agreement for sale, it was granted with interest from the date of the agreement till realisation of the sum.

19. Lt.Col K.C Bheemaiah Vs. Kakamada A. Kuttappa

And Ors [AIR 2004 Kant 224] was relied on by the learned counsel for the plaintiff to invite this Court's attention to the grant of a direction to the respondent to return the earnest money alongwith interest, in case a decree for specific performance was declined by the court. Paragraphs 21 and 22 of the above case are extracted hereinbelow for easy reference:

> 21. These requirements are in the instant case fully satisfied. The suit in question is a suit for specific performance of the agreement executed between the parties. This Court is declining the decree of specific performance for the reasons already set out earlier. That being so, the power vested in this Court under Section 22 to direct refund of the amount received by the defendants cannot be disputed or the exercise thereof grudged by the defendants. The argument of Mr. Subbaiah that the plaintiff ought to file a separate suit for recovery of money paid by him has not appealed to us. The policy of law is to avoid multiplicity of legal proceedings. An interpretation that would advance that laudable object ought to be preferred over any other interpretation which may make litigation an endless agony for the litigant public. We therefore have no hesitation in holding that the appellant is entitled to a direction for refund of the amount paid by -:18:-

him to the defendants in terms of the Agreement in question.

22. The only other aspect that needs to be considered is

whether the appellant is also entitled for payment of interest at the stipulated rate. The provisions of Section 22 however do not make any mention about the interest payable on the amount received by the defendants, whether the same be contractual or otherwise. The fact however remains that the defendants have made use of the money paid by the plaintiff all this time. Refund of the amount so paid will remain inequitable so long as the plaintiff is not suitably compensated in terms of interest for the period during which the said amount was utilized by the defendants. The interest so payable is however purely on equitable consideration and may not be awarded at the rate contracted between the parties. In the circumstances and having regard to the bank's rate of interest prevalent currently and in the immediate past, we deem it just and proper to direct that the amount of Rs. 2,50,000/- received by the respondents in terms of the agreement shall be refundable to the plaintiff with interest from the suit till the date of refund at the rate of 8% p.a. (Emphasis supplied)

20. Jagdish Singh Vs. Natthu Singh [1992 AIR 1604]

was relied on by the learned counsel for the plaintiff to rest his contention that compensation in lieu and substitution of specific performance was awarded to the respondent on being convinced that he was ready and willing to perform the contract and that it fails on account of the breach of the appellant.

21. Raman V. Sethumadhavan and Another [2014 -:19:- KHC 2547] is relied on by the learned counsel for the plaintiff to

indicate the scope for remand of a case to the court below. It is held

that the Appellate Court shall not remand the case to the trial court when there is sufficient evidence on record to decide the case. Instead, the issue has to be decided by the Appellate Court itself.

22. Babu Lal Vs. Hazari Lal Kishori Lal and Ors [1982

AIR 818] was relied on by the learned counsel for the plaintiff to apprise this court of the legislative intention behind incorporation of Section 22 in the Specific Relief Act. Relevant paragraph is extracted hereinbelow for reference purpose:

> Section 22 enacts a rule of pleading. The Legislature thought it will be useful to introduce a rule that in order to avoid multiplicity of proceedings the plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking, the right to possession accrues only when suit for specific performance is decreed. The Legislature has now made a statutory provision enabling the plaintiff to ask for possession in the suit for specific performance and empowering the court to provide in the decree itself that upon payment by the plaintiff of the consideration money within the given time, the defendant should execute the deed and put the plaintiff in possession. The section enacts that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate reliefs, namely, he may ask for possession, or for partition, or for separate possession including the relief for -:20:-
>
> specific performance. These reliefs he can claim, not- withstanding anything contained in the Code of Civil Procedure, 1908, to the contrary, Sub-section (2) of this section, however, it specifically provides that these reliefs cannot be granted by the Court, unless those have been expressly claimed by the plaintiff in the suit. Sub-section (2) of the section recognised in clear terms the well-established rule of procedure that the court should not entertain a claim of the plaintiff unless it has been specifically pleaded by the plaintiff and proved by him to be legally entitled to. The provision to this sub-section (2), however, says that where the plaintiff has not specifically claimed these reliefs in his plaint, in the initial stage of the suit, the court shall permit the plaintiff at any stage of the proceedings, to include one or more of the reliefs, mentioned above by means of an amendment of the plaint on such terms as it may deem proper. The only purpose of this newly enacted provision is to

avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications. (Emphasis supplied)

23. Pushpagiri Mutt V. C. Indiramma [2003 KHC

3149] has been relied on by the learned counsel for the plaintiff to rest his contention that even in the absence of a claim for an alternative relief of refund of money in the plaint in a case wherein the plaintiff was found to be not entitled to get a relief of specific performance, in the backdrop of a prayer existing in the suit, to grant such other relief or reliefs as the Hon'ble Court may deem fit

-:21:- and necessary in the circumstances of the case in the interest of justice, an order for refund of the amount with interest at the rate of 6% p.a till date of payment is possible.

24. The learned counsel for the defendant/Cross objector has

relied on K.Narendra Vs. Riviera Apartments (P) Ltd. [1999 KHC 1209] to contend that jurisdiction to grant a decree for specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.

25. According to him, the court has found that performance

of contract involving some hardship on the defendant which he did not foresee while non performance involving no such hardship on the plaintiff, is one of the circumstances in which the court may properly exercise discretion not to decree specific performance.

26. Sunil Chandra Ghosh Vs. Hemendra Kr.Deb [AIR

1985 Cal 233] was also relied on to contend that relief by way of specific performance is discretionary under Section 20 and therefore, persons seeking the relief must come to the court with clean hands and in case of fraud or some other practices, no relief available by -:22:- way of specific performance will be granted.

If the contract itself is not fair and one-sided, the court may refuse to enforce contract.

27. Prasanna Vs. Sreedharan [1995 (2)KLT 499] was

relied on by the learned counsel for the defendant/cross objector to rest his contention that a contract for sale of immovable property, has to be construed with reference not only to the intention of the parties as stated in the contract, but also the circumstances under which the terms and conditions of the contract, which were agreed upon by the parties.

28. Madhavan V. Thankam [2007 (2) KLT SN 17

(C.NO.26)] was relied on by the learned counsel for the defendant/cross objector to contend that it is not always necessary to grant specific performance simply for the reason that it is legal to do so.

29. Somasekharan Nair Vs. Priyakumar 2020 (6)

KLT SN 25 (C.No.22) was relied on by the learned counsel for the defendant/cross objector to rest his contention that merely because the buyer was ready and willing to perform his part of the contract and it was lawful to award a specific relief, he is not entitled as of right to obtain a decree for specific performance since it is still a

-:23:- matter of discretion of the court, which it has to exercise guided by judicial principles.

30. Kamal Kumar V. Premlata Joshi [2019 (1) KLT

3054 (SC)] was relied on by the learned counsel for the defendant/cross objector to rest his contention that to avail relief of specific performance, parties need to plead and prove all statutory requirements prescribed under the provision of the Act and only then the court is entitled to exercise its discretion to grant or refuse the relief according to the case made out by parties.

31. Antony Correya V. Mohammed Abdul Rahiman

[2018 (3) KLT 31] was relied on by the learned counsel for the defendant/cross objector to apprise this Court of the relevant factors which would enable the court to mould the relief in accordance with the mandate under Section 12 of the Act. The dictum in the above case is extracted hereunder:

> 8. In a suit for specific performance of contract, being the relief discretionary based on equitable principle, the Court has to consider all the relevant factors which would enable the Court to mould the relief in accordance with the mandate under S.12 of the Act when it is found to be not proper to decree the specific performance in whole. The advance amount, if any, paid at the time of execution of the contract and the subsequent payments, if -:24:-
>
> any, out of the total sale consideration and its extent, the period of contract originally agreed and its extension, if any, should be taken into consideration in reference to the time in which the contract was executed, part payments were made, the time taken for disposal of the suit, the high rate of inflation and the enhancement of value of immovable property day by day. Clause

(c) of S.20(2) of the Specific Relief Act stipulates that the Court

> can exercise its discretion not to decree specific performance when the circumstances under which the contract was entered into, though not rendering the contract voidable, makes it inequitable to enforce specific performance. Explanation 1 states that mere inadequacy of consideration, or that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (a) or hardship within the meaning of clause (b). Clause

(c) is excluded from the purview of Explanation 1 and it is so

conspicuous. In other words, the expressions unfair advantage and hardship with its explanation incorporated under S.20(2) of the Specific Relief Act is applicable only to cases which would fall under clause (a) or (b) and not to clause (c). The circumstances under which a contract was entered may become inequitable either in part or in whole, in enforcement of specific performance. The time taken for its enforcement through Court has become so vulnerable due to the enhancement of value of immovable property day by day and high inflation rate of Indian currency. The time taken for ultimate disposal of the suit for specific performance after long pendency, both in Trial Court and in Appellate Court may cause the contract for sale of immovable property sometimes inequitable either in whole or in part. -:25:-

32. Mathew V. Kuruvila [1988 KHC 79] was relied on by

the learned counsel for the defendant/cross objector to rest his contention that Section 20 preserves judicial discretion to courts as to decreeing specific performance.

33. Grasim Industries Ltd. And Another V. Agarwal

Steel [2010 KHC 6130] was relied on by the learned counsel to contend that when a person signs a document, presumption is that he has read the document properly and understood it and only then affixed his signatures thereon, unless there is proof of force or fraud.

34. Mohammed Mamdouh Matwally Ghali V. Kerala

Automobiles Ltd. [2011 (3) KLT 159] was relied on by the learned counsel to rest his contention that appellate jurisdiction is co-extensive and co-terminus with jurisdiction of first court.

35. Dattatraya V. Rangnath Gopalrao Kawathekar

[AIR 1971 SC 2548] was relied on to contend that if the person signing the document pleads ignorance then in certain circumstances it may be necessary for

the party seeking to prove the document to satisfy the court that the executant had knowledge of its contents.

36. State of Kerala V. Venugopalan [1987 (1) KLT SN 15 (C.NO.28) was relied on by the learned counsel to rest his -:26:- contention that failure to cross-examine a witness on an aspect amounts to acceptance of that aspect by opposite side.

37. Kanshi Ram V. Om Prakash Jawal [AIR 1996 SC

2150] is relied on by the learned counsel for the defendant/cross objector to rest his contention that grant of decree for specific performance is not automatic but based on discretion, which is to be exercised on principles of justice, equity and good conscience.

38. In the backdrop of the submissions made hereinabove

and decisions cited by the respective counsel, this Court has to see whether issue No.1 in the judgment under challenge has been answered by the court below in the proper perspective. The court below has relied on the oral evidence of PWs 1 to 4 and was convinced on the validity of execution of Ext.A2 agreement for sale with reference to which the decree for specific performance of contract was sought.

39. The contention of the defendant/cross-objector was that PW1 is none other than the plaintiff and since PWs 2 to 4 examined by him are also partisan witnesses, independent evidence it totally lacking to corroborate her version. According to him, Ext.A2 agreement for sale was contended as the outcome of fraud and -:27:-

misrepresentation of the plaintiff and despite raising a contention specifically in the written statement, an issue regarding that has not been raised and thus an opportunity to adduce evidence to establish the same was denied to him. According to him, a finding on issue No.1 was entered into by the court below without adverting to any of the elements, which was alleged by the defendant as vitiating the execution of the agreement for sale. The learned counsel for the plaintiff urged that there is no mandate in law that the agreement for sale must be

signed by independent witnesses who are totally strangers to the parties to the agreement. According to him, the court while appreciating the evidence must be conscious while scrutinizing the evidence let in by the witnesses to see whether they are creditworthy or not. According to him, the version of witnesses PWs 2 to 4 corroborate in material aspects of the case and therefore the court below has relied on those to conclude that Ext.A2 was a validly executed document.

40. On a scrutiny of the evidence of PW1, this Court is

convinced that the evidence tendered fully support the pleadings raised by him in the plaint. A glance at the oral evidence tendered by PWs 2 to 4 would make it clear that those also lend clear support to -:28:- the version of PW1. May be that they are interested witnesses but when they speak in the box in tune with the version of PW1 and their version maintain consistency throughout examination without a tinge of doubt being emulated, there is every reason to rely on those.

41. The court below has relied on the versions of PWs 1 to 4 to

hold that Ext.A2 was a validly executed agreement for sale. In the above context, this Court has only to upheld the arguments of the learned counsel for the plaintiff and to discard those of the defendant/cross objector. No valid reason emerge to turn down the affirmative finding of the court below on Ext.A2.

42. As established from the impugned judgment the court

below has also shown keen interest to find that hardships that would be caused to the defendant on grant of a decree for specific performance in favour of the plaintiff is more when compared to the advantages that would be resulted to the plaintiff on grant of a decree being declined.

43. In view of the decisions relied on by the learned counsel

for the plaintiff, the defendant/cross objector who is raising a plea on comparative hardships as a defence must plead that in his written statement. In the case on hand, a glance at the written statement in -:29:- the case on hand would reveal that in paragraph 40 of the same, the defendant has contended as follows: 40. The

defendant will be put to untold hardship and loss if the relief sought for is allowed as the very nature of the entire property of the defendant would be rendered useless and so also the plaintiff will not be benefited in any manner if the illegal agreement is enforced.

44. The plea raised is undoubtedly a precise one. Therefore,

when the defendant has raised a plea of untold hardship, it is for the court below to frame it as an issue. Issues raised by the court below are extracted supra and it is pertinent to note that a issue regarding hardships of defendant was not raised. The issue of hardships being a question of law and facts, necessarily it has to be established by the defendant by adducing cogent and reliable evidence. The plaintiff must also be granted with opportunities to controvert the evidence let in by the defendant. In the case on hand as rightly pointed out by the learned counsel for the plaintiff the court below failed to raise hardships of the defendant as an issue and thereby denied opportunity to the parties to adduce evidence to establish the same.

45. The court below has observed in paragraph 12 of the impugned judgment that: -:30:-

> 12. It is trite law that in order to deny the specific performance there need not be any fraud or misrepresentation by the plaintiff. It is enough if there is inequality or unfairness due to any cause whatsoever, the court refuses the relief of specific performance, if there are signs of distress in the party against whom it is sought. In this case on anxious consideration of available inputs, this Court is of the view that unfair advantage would result to the plaintiff over the defendant and it would render enforcement of Ext.A2 inequitable and the hardship that may be caused to the defendant is much more than what the hardship that would be caused to the plaintiff. Hence it would be inequitable to grant a decree of specific performance against defendant.

46. The court below has found it inequitable to grant a decree

of specific performance against the defendant on finding that the hardships that may be caused to the defendant by such grant is much more than the hardships that would be caused to the plaintiff. The court below has also stated that the conclusion on hardships was arrived at on an "anxious consideration of available inputs". Since the finding was not arrived at in its effort to answer an issue raised specifically on the point based on any evidence emerged while trying that issue, the finding is not justified.

47. What are the inputs relied on by the court below to reach the conclusion regarding hardships of the defendant is quite -:31:-

unclear. The inputs must be oral or documentary evidence. When those are lacking for consideration of the court below this Court has no hesitation to hold that the court below is erred. It is worthy to note that an alternative relief for return of money on a decree of specific performance being declined, is also raised in the suit by the plaintiff.

48. Section 22 of the Specific Relief Act, 1963 being apposite in the context is extracted hereunder:

22. Power to grant relief for possession, partition, refund of earnest money, etc.-

(1) Notwithstanding anything to the contrary contained in the

Code of Civil Procedure, 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for-

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him, in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section (1)

shall be granted by the court unless it has been specifically claimed: Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the -:32:- proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the court to grant relief under clause (b) of sub-section (1) shall be without prejudice to its powers to award compensation under Section 21. (Emphasis supplied)

49. It is clear on a reading of the proviso to Sub-section (2) that evenif the plaintiff failed to raise such a relief in the plaint, the court shall , at any stage of the proceedings, allow him to amend the

plaint to incorporate such relief. In view of the usage of the word shall in the proviso, it is obligatory on the part of the court to permit a party to amend the plaint to incorporate the relief of return of advance money, which he failed to incorporate in the plaint at the time of its institution. Various courts had interpreted the proviso in various manners and the position of law is now settled that even without amending the plaint or getting the alternative relief incorporated in the plaint, a decree for return of advance money could be passed by the court for advancement of justice. The learned counsel has also apprised this Court of the legislative intention while incorporating the proviso under Section 22 while enacting it, as avoidance of multiplicity of proceedings.

-:33:-

50. This Court has already made the mind to uphold the

finding of the court below on issue No.1. This Court has also made it clear in the discussion hereinabove that without a plea on hardships on defendant and issue being raised on such a plea and without evidence being let in by the defendant to substantiate the issue and opportunity declined to the plaintiff to cross examine him, the court below has gone wrong in recording a finding that hardships that would be caused to the defendant on grant of a decree is more than the hardships that would be caused to the plaintiff on declining to

grant the decree in his favour. It is found from the impugned

judgment that the court below has answered the second issue

whether the plaintiff is entitled to decree for specific performance on the sole basis of its finding on hardships of the defendant. A reading of the impugned judgment would make it clear that a Commission was taken up at the instance of the defendant and Ext.C1 report was filed by the Commissioner. It is true that Ext.C1 report was marked without any opposition being raised. It is true that the Advocate commissioner was examined. Since an issue on comparative hardships was not raised by the court below, it cannot be said that by cross examining the Commissioner or non opposing -:34:- the marking of Ext.C1 sufficient opportunity has been availed by the

plaintiff to establish the question of comparative hardships. Only when a specific issue in that regard is raised, the parties would let in evidence to establish that. In the case on hand, since an issue was not raised, opportunity already availed to cross examine the Advocate Commissioner cannot be taken as availing of sufficient opportunity by the plaintiff to cross examine him on comparative hardships.

51. In the above circumstances, expediency of justice

demands the judgment under challenge to be set aside and to remand the case back to the court below for raising an issue on comparative hardships and letting the parties to adduce additional evidence for reconsideration of the case. Since this Court has opted to issue a direction to the court below to reexamine the case, it is appropriate that the amendment of the plaint now sought can also be considered by the court below.

In view of the above discussion the appeal and Cross Objection succeed and are allowed. The impugned judgment is set aside. The court below shall frame an additional issue on comparative hardships and grant adequate opportunities to both parties to adduce evidence afresh to establish the same. As per the position of -:35:-

law settled, even without a prayer being raised in the plaint for return of advance money, the court below is justified in granting the relief in the interest of justice. The decisions cited by the learned counsel for the plaintiff clearly speak about such a measure being taken by the courts of law. The court below shall see that O.S.No.504/2007 is disposed off within a period of four months from the date of receipt of a certified copy of this judgment. Sd/- MARY JOSEPH, JUDGE JJ

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