G. Krishnakumar vs S. Sundaresh

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Court : Kerala

Decided On : Aug-22-2023

Judge : Honourable Mr. Justice Sathish Ninan

Appeal No. : RFA/27/2011

Appellant : G. Krishnakumar

Respondent : S. Sundaresh

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE SATHISH NINAN TUESDAY, THE 22ND DAY OF AUGUST 2023 / 31ST SRAVANA, 1945 RFA NO. 27 OF 2011(H) AGAINST THE JUDGMENT DT. 17.02.2010 IN OS 262/2002 OF ADDITIONAL SUB COURT, KOLLAM ----- APPELLANTS/DEFENDANTS 1, 2: 1 G. KRISHNAKUMAR, S/O GOPALAN, ALAYATHU VEEDU, KOTTAKKAKOM WARD, KOLLAM, NOW RESIDING AT C/O.ANIL KUMAR, PANKAPARAMBIL, NEAR POOTHOTTA BRIDGE, OPPOSITE LADY'S HOSTEL, CHERTHALA. 2 GEETHA KRISHNAKUMAR, W/O.G.KRISHNA KUMAR, ALAYATHU VEEDU, KOTTAKKAKOM WARD, KOLLAM, NOW RESIDING AT C/O.ANIL KUMAR, PANKAPARAMBIL, NEAR POOTHOTTA BRIDGE,

OPPOSITE LADY'S HOSTEL, CHERTHALA. BY ADV J.OM PRAKASH RESPONDENTS/PLAINTIFF & DEFENDANTS 3, 4: 1 S. SUNDARESH PAI, S/O ANANDA PAI.S, GUNAPRIYA, T.D.ROAD, CUTCHERRY WARD, CUTCHERRY.P.O., KOLLAM WEST VILLAGE. 2 QUILON DISTRICT CO-OPERATIVE BANK LTD., NO.4311, HAVING ITS REGISTERED OFFICE AT CANTONMENT WARD, SHECOTTAH ROAD, KOLLAM, REP.BY ITS GENERAL MANAGER, QUILON DISTRICT CO-OPERATIVE BANK LTD., KOLLAM. 3 THAMPI, PROPRIETOR, ANUPAMA TRADERS, MAIN ROAD, KOLLAM. RFA NO. 27 OF 2011 -2- * ADDITIONAL RESPONDENT NO.4 4 S.RAMESH KUMAR, S/O.LATE TMS SREENIVASA REDDIAR, AGED 53 YEARS, RESIDING AT 'SREEDEVI DURGA', NEAR DURGA TEMPLE, KOTTAKKAKOM WARD, KOLLAM. * [ADDITIONAL FOURTH RESPONDENT IS IMPLEADED IN THE PARTY ARRAY VIDE

ORDER DATED 03.12.2019 IN IA 755/2015]

BY ADVS. SRI.LEGITH T.KOTTAKKAL SRI.T.R.HARIKUMAR, SC, KOLLAM DISTRICT COOPERATIVE BANK LTD. SRI.R.SATISH KUMAR SRI.T.R.HARIKUMAR, SC, KOLLAM DISTRICT COOPERATIVE BANK LTD. SRI.S.VINOD BHAT THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 22.08.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SATHISH NINAN, J.

= = = = = = = = = = = = = = = = = = R.F.A. No.27 of 2011 = = = = = = = = = = = = = = = = = = Dated this the 22nd day of August, 2023

J U D G M E N T

The decree for specific performance of an agreement for sale is under challenge by defendants 1 and 2.

2. Ext.A1 is the agreement dated 30.06.2001 which

is sought to be specifically enforced. The property involved is scheduled in two items to the agreement-item 1 having an extent of 14.900 cents with a building thereon bearing building number KC 45/964, and item 2 having an extent of 20 sq.m. Both the items lie together as a single plot. The period fixed for performance is one year. The consideration fixed is ` 1 lakh per cent. An amount of ` 2,50,000/- was paid on the date of Ext.A1 as advance sale consideration. Thereafter on 18.08.2001, as evidenced by Ext.A2 receipt, a further amount of

` 50,000/- was paid towards advance consideration. Thereafter also there has been two payments of ` 5,000/- -: 2 :- each on 12.10.2001 and 16.10.2001 respectively, towards advance sale consideration. Thus the total advance sale consideration paid is ` 3,10,000/-. Alleging failure on the part of the defendant to honour the agreement, the suit was filed.

3. The defendants though admitted the execution of

Ext.A1 agreement, contended that it was executed only as a security for loan availed by them from the plaintiff. The receipt of ` 3,10,000/- on the dates as pleaded by the plaintiff was admitted.

4. The trial court upheld Ext.A1 and granted a decree.

5. Heard learned counsel on either side.

6. The points that arises for determination are:-

(i) Do the evidence on record establish that Ext.A1 agreement was intended as a sale agreement or was it only a security for money transaction between the parties ?

(ii) Exercise of discretion under Section 20 of the Specific Relief Act ? -: 3 :-

7. The execution of Ext.A1 agreement is admitted.

The receipt of amounts as pleaded by the plaintiff is also admitted. The contention of the defendant is that the transaction between the parties was only a monetary one.

8. As per Ext.A1 agreement, the obligations cast on

the defendant are, to get release of a mortgage subsisting over the property with a co-operative Bank and get back the original title deeds, to measure out the property and convince the plaintiff regarding the

extent, and obtain encumbrance certificate and tax receipt relating to the property. Ext.A1 specifically recites that the advance amount of ` 2,50,000/- is being paid on the date of the agreement to redeem the mortgage with the Bank and to get release of the title deeds. Once that liability is settled with the advance amount, all that remains is to get back the title deed and obtain the encumbrance certificate and tax receipt, and to measure out the property. For the said purpose,

-: 4 :- obviously, a period of one year was not necessary.

9. In spite of the receipt of further advances amounting to ` 60,000/-, the mortgage with the Bank was not redeemed even as on the date of the suit. Even after

payment of the advance amount of ` 2,50,000/- on 30.06.2001 for redeeming the mortgage, it would appear that the plaintiff made further advances without even ascertaining as to whether the mortgage was redeemed. The above aspects cast incertitude on the nature of the transaction between the parties.

10. The schedule description to Ext.A1 agreement

and also the plaint schedule mentions of the existence of one building in the property bearing No. KC 45/964. It is the case of the defendant that, the property contains three buildings bearing three different numbers. It has been so specifically contended in the written statement of defendants 1 and 2. To substantiate the contention, the defendants have produced Ext.B1 certificate issued from the Corporation to the effect -: 5 :- that defendants 1 and 2 are the owners of the buildings

bearing No.MC XXIII/150, 151, 152. Neither of the parties have taken out a commission to ascertain the same. No evidence is brought on record to show that there is only one building, the different portions of which had three different numbers (as suggested by the learned counsel for the respondents 1 and 2) which were subsequently renumbered by assigning a single number. There is no such case for the plaintiff. Even assuming that there is only one building, the different portions of which are given different numbers, still, Ext.A1 agreement relates to only that portion of the building which bears the number mentioned in the agreement, the other portions which bears different numbers are not subject matter of the agreement. The said portions not being subject matter of the agreement, the plaintiff is not entitled to seek for conveyance of the same in pursuance of the agreement.

-: 6 :-

11. In paragraph 5 of the plaint, it has been pleaded thus :-

> ..... During January 1st week the property was measured in the presence of 1st defendant and plaintiff by one K.Viswanatha Rao Rtd. Village Officer and it has been found that measurement of A schedule is 5.98 ares and B schedule 20 sq.mtrs and he had given the sketch of plaint schedule properties to the 1 st defendant and 1st defendant has entrusted a photocopy of the plan that is produced herewith. ......

However, in Ext.A7 notice issued by the plaintiff prior to the filing of the suit, it has been stated thus :- ..... You have not measured and satisfied my client regarding the extent of property you have also not satisfied my client that the property is free from encumbrances. ..... Evidently, the stand adopted by the plaintiff is contradictory. In one breath he says that the property was not measured whereas in the next breath he says that it was measured. -: 7 :-

12. Relying on the judgments of the Apex Court in

Mehboob-Ur-Rehman v. Ahsanul Ghani AIR 2019 SC 1178 and C.S.Venkatesh v. A.S.C. Murthy 2020 (3) SCC 280, the learned counsel for the appellant-defendant would contend that, irrespective of the defence set up by the defendant, it is for the plaintiff to aver and prove in terms of Section 16(c) of the Specific Relief Act about the continuous readiness and willingness of the plaintiff to go ahead with the transaction. It is for the plaintiff to prove that he was possessed of sufficient means to complete the transaction. In Mehboob-Ur-Rehman v. Ahsanul Ghani AIR 2019 SC 1178, the Apex Court held at paragraph 15 of the judgment thus :-

> 15. Such a requirement, of necessary averment in the plaint, that he has already performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him being on the plaintiff, mere want of objection by the defendant in the written statement is hardly of any effect or consequence. ..... -: 8 :-

In C.S.Venkatesh v. A.S.C. Murthy 2020 (3) SCC 280, the Apex Court

held thus :-

> 16. The words ready and willing imply that the plaintiff was prepared to carry out those parts of the contract to their logical end so far as they depend upon his performance. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of performance. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of contract, the court must take into consideration the conduct of the plaintiff prior, and subsequent to the filing of the suit along with other attending circumstances. The amount which he has to pay the defendant must be of necessity to be proved to be available. Right from the date of the execution of the contract till the date of decree, he must prove that he is ready and willing to perform his part of the contract. The court may infer from the facts and circumstances whether the plaintiff was ready and was always ready to perform his contract.

17. In N.P.Thirugnanam v. R. Jagan Mohan Rao, it was

held that continuous readiness and willingness on the part of

the plaintiff is a condition precedent to grant of the relief of specific performance. This circumstance is material and relevant and is required to be considered by the court while -: 9 :- granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the plaintiff prior to and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the defendant must necessarily be proved to be available.

21. .. It is not necessary for the plaintiff to produce ready money, but it is mandatory on his part to prove that he has the means to generate the consideration amount. ..

With regard to the availability of funds for payment of the balance consideration, it is well settled that the purchaser need not jingle money in his pockets. However, he is to establish that he is possessed of sufficient funds or has the means to raise the money for payment. The plaintiff as PW1, in his cross-examination has stated that an amount of ` 13 lakhs was borrowed/to be borrowed from his brother and that the amount was at his disposal. The relevant portion of his deposition reads thus :-

-: 10 :- Rm tN-s I-n \npw tem hm-n-b-Xm-Wv. 13 e-w cq] tem hmn. tN income tax payee BWv. tN- Xp-I XXv Iym-jm-bn. DD tbm sNtm B-bn-v X-cm-sa-v]-d-p. Transaction \-S-p- Znhkw payment sN-m th-n tN- k---\m-bn- cpp. A-t-Znh-kw F-s control Xp-I D-m-bn- cpp. tN-s Xp-I-sbmw Fs control B-bn-cpp. \n--fpsS control 13 e-w cq-] D-s-v Im-Wn-m tc-J-I hXpw D-m-bn-cptm (Q). C (A).

No material is produced to show the availability of the said amount; though the brother of the plaintiff is examined as PW4, such arrangement is neither spoken to by him, nor is any evidence adduced regarding advancing of ` 13 lakhs as claimed by PW1. Therefore, the availability of funds or the source has also not been proved. Thus the plaintiff was unable to prove his readiness and willingness in terms of Section 16(c).

13. The various aspects as noted above were not taken into consideration by the trial court. As discussed above for various reasons, the plaintiff is -: 11 :- not entitled for a decree for specific performance. At any rate, as has been noticed supra, there are manifold circumstances which need to go into the zone of

consideration while deciding on the exercise of discretion under Section 20. On the discussions afore, I find that the discretion is liable to be exercised to refuse a decree for specific performance. The decree of the trial court is liable to be interfered.

14. After the hearing on the appeal was completed,

noticing that the plaint does not contain the alternate relief for return of the advance amount, the plaintiff was permitted to amend the plaint to incorporate such relief in terms of Section 22 of the Specific Relief Act. The respondent-plaintiff has filed such application as IA No.2/2023. There is no reason why the plaintiff should not be granted a decree for return of advance amount with interest. It is deemed appropriate to grant interest at the rate of 12% per annum from 16.10.2001 till the date of decree from the date of payment.

-: 12 :- Resultantly, the appeal is allowed. The decree and

judgment of the trial court are set aside. The plaintiff

is granted a decree for realisation of ` 3,10,000/- with interest at the rate of 12 % p.a. from 15.10.2001 till date of decree (22.08.2023), and thereafter at the rate of 9% p.a. till realisation. The amount shall be a charge on the plaint schedule property. The plaintiff shall be entitled for proportionate costs throughout.

Sd/- SATHISH NINAN JUDGE kns/- //True Copy// P.S. to Judge