

Nagarajan vs Narayani Ammal

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Court : Kerala

Decided On : Sep-30-2023

Judge : Honourable Mrs. Justice C.S. Sudha

Appeal No. : RFA/237/2003

Appellant : Nagarajan

Respondent : Narayani Ammal

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE C.S. SUDHA
SATURDAY, THE 30TH DAY OF SEPTEMBER 2023 / 8TH ASWINA,
1945 RFA NO. 237 OF 2003 (F) AGAINST THE JUDGMENT AND
DECREE DATED 26.10.2002 IN OS 234/1994 ON THE FILE OF
ADDITIONAL SUBORDINATE JUDGE'S COURT, PALAKKAD
APPELLANT/PLAINTIFF: NAGARAJAN S/O CHINNAPPAN CHETTIAR,
RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI, PIRAYIRI
AMSOM, PALAKKAD TALUK. (THE APPELLANT IS REPRESENTED
BY HIS BROTHER AND POWER OF ATTORNEY HOLDER
C.NONJAKUMARAN, RESIDING AT CHETTIYAR KALATHIL,
THIRUNELLAYI, PIRAYIRI AMSOM, PALAKKAD TALUK.) BY

ADVS.SRI.T.C.SURESH MENON SRI.R.RAJA RAJA VARMA
SRI.SREEKANTH.K.R SMT.M.R.VALSA

RESPONDENT/DEFENDANT: R1 * NARAYANI AMMAL (DIED) W/O CHINNAPPAN CHETTIAR, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI, PIRAYIRI AMSOM, PALAKKAD TALUK. * ADDL.R2. VIJAYALAKSHMI, D/O.LATE NARAYANI AMMAL, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI POST, PALAKKAD-678 004. * ADDL.R3.DHANABHAGYAM, W/O.SHANMUGHAM, RESIDING AT 23/28A, VENKITASWAMI NAGAR, KURICHI, 24, SUNDARAPURAM, COIMBATORE, TAMILNADU. * ADDL.R4. THANKAMMA, D/O.LATE NARAYANI AMMAL, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI POST, PALAKKAD-678 004. * ADDL.R5. KASIRAJAN, S/O.CHINNAPPAN, RESIDING AT CHETTIYAR KULAM, CHAKKANAKATH, NILAMBOOR P O, MALAPPURAM-679 329. * ADDL.R6. PANEER SELVAN, S/O.LATE NARAYANI AMMAL, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI POST, PALAKKAD-678 004. * ADDL.R7. KRISHNAMOORTHY, S/O.LATE NARAYANI AMMAL, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI POST, PALAKKAD-678 004. * ADDL.R8. BHAGYAVATHI RAJAN, X-1/201F, PAZHANICHAMI NAGAR, CHETTIYAR PALAYAM ROAD, MARIMICHAMPETTY, COIMBATORE-647 201. * ADDL.R9. GURUVAYOORAPPAN, S/O.LATE NARAYANI AMMAL, RESIDING AT CHETTIYAR KALATHIL, THIRUNELLAYI POST, PALAKKAD-678 004. LEGAL HEIRS OF DECEASED R1 ARE IMPEADED AS ADDITIONAL RESPONDENTS 2 TO 9, AS PER ORDER DATED 24/09/2018 IN IA 1898/2015. R7 AND R9 BY ADVS.N.SUKUMARAN (SR.) S.SHYAM SRI.N.K.KARNIS THIS REGULAR FIRST APPEAL HAVING COME UP FOR FINAL HEARING ON

C.S.SUDHA, J.

----- Dated this the
30th day of September, 2023

JUDGMENT

This appeal under Order XLI Rule 1 C.P.C. has been filed by the plaintiff in O.S.No.234/1994, a suit for specific performance on the file of the Subordinate Judge's Court, Palakkad. The trial court by the impugned

judgment dated 26/10/2002 dismissed the suit. The respondent herein, the

sole defendant in the suit passed away during the pendency of the appeal and hence her legal representatives have been impleaded as additional respondents 2 to 9. The parties will be referred to as described in the suit.

2. The case of the plaintiff in brief is - the plaint schedule property owned by his mother, the defendant, was agreed to be sold to him for a sale consideration of 1,65,000/- relating to which Ext.A1 agreement dated

as advance sale consideration on the date of the agreement itself. The remaining sale consideration was agreed to be paid in installments, i.e., 20,000/- each on 01/08/1993; 01/10/1993; 01/01/1994 and 30/04/1994. The plaintiff was put in possession of the property on the date of Ext.A1 agreement itself. The plaintiff was conducting a rice-mill in the property. As per the terms of the agreement, the plaintiff has paid an amount of 80,000/- on various dates and endorsements regarding the payments made to the defendant have been made on the reverse side of the agreement. The plaintiff was liable to pay the balance sale consideration on 30/04/1994. However, the plaintiff's father insisted that the balance sale consideration of 50,000/- should be paid on 01/01/1994 itself, for which the plaintiff was not amenable. The plaintiff was warned that if the balance consideration was not paid on

defendant, which was refused to be accepted. The defendant was not amenable for the execution and registration of the sale deed. The plaintiff has been remitting

electricity charges, building tax and other taxes ever since the date of Ext.A1 agreement. The plaintiff was always ready and willing to perform his part of the contract. However, the defendant failed to perform her part of the contract and hence the suit.

3. The defendant filed written statement denying the execution of

Ext.A1 agreement. According to her, the plaintiff and two of her other sons namely, Monjakumaran (PW1) and Paneer Selvan (DW5) were in inimical terms with her and her husband. They were causing unnecessary hindrance to the defendant's peaceful possession and enjoyment of the property. Hence the defendant and her husband decided to sell the property to a third person by way of Ext.B6 agreement dated 25/01/1994. As per the said agreement, the sale consideration was fixed at 2,65,000/- out of which an amount of 25,000/- was received as advance. To prevent the execution of Ext.B6 agreement, the plaintiffs, PW1 and DW5 came to the house of the defendant when her husband was away, forcibly took her to an unknown place and got her thumb impressions on certain blank papers as well as stamp papers. The defendant informed her husband pursuant to which, a complaint was lodged before the Town Police Station, Palakkad. Ext.A1 agreement relied on by the plaintiff has been created fraudulently by using the blank papers in which the thumb impressions of the defendant were obtained by force and threat. No advance amount or any amount has been paid by the plaintiff as alleged in the plaint. The allegation that possession of the property was handed over to the plaintiff on the date of the agreement is false and incorrect. As the plaintiff and his brothers made attempts to trespass into the plaint schedule property and cause disturbance to the enjoyment of the property, the defendant filed O.S.No.531/1994 before the Munsiff Court, Palakkad, seeking a decree of permanent prohibitory injunction. The allegation that electricity charges and other taxes have been paid by the plaintiff since the date of Ext.A1 agreement is false and incorrect. As Ext.A1 agreement is a fabricated document, the plaintiff is not entitled to get the reliefs prayed for.

4. O.S. No.531/1994 filed before the Munsiff Court, Palakkad, was transferred by order of the District Court dated 07/09/1997 in O.P.No.92/1997 to the Subordinate

Judge's Court, Palakkad. The suit was

registered as O.S.No.344/1997 in the said court. In the said case, she also had a case that her husband had executed Ext.B8 Will as per which the plaint schedule property has devolved on her.

5. Before the trial court, a joint trial of both the cases was conducted. O.S.No.234/1994 was treated as the main case in which evidence has been recorded. PW1 was examined and Exts.A1 to A4 were marked on

the side of the plaintiff. DW1 to DW5 were examined and Exts.B1 to B8 were marked on the side of the defendant. The trial court upon an appraisal of the oral and documentary evidence and after hearing both sides, dismissed both the suits. The plaintiff in O.S.No.234/1994, aggrieved by the impugned judgment, has come up in appeal. There is no appeal against the dismissal of O.S.No.344/1997 and hence I will be referring only to the case in O.S.No.234/1994.

6. The point that arises for consideration in this appeal is whether there is any infirmity in the findings of the trial court calling for an interference by this Court.

7. Heard both sides.

8. It was submitted by the learned counsel for the

plaintiff/appellant that the trial court proceeded on conjectures and surmises and formed a case which neither of the parties had. PW1, the brother of the plaintiff, was never shown Ext.A1 agreement or asked regarding the thumb impressions of the defendant in the same. Without any such exercise, the trial court found that the thumb impressions appear to be smudged and hence the possibility of the thumb impressions being obtained by force and compulsion, thus probabilsing the case of the defendant. The trial court also found that in normal course, the endorsements regarding payments made on

of the first page of Ext.A1 and the endorsements regarding the third and fourth payments, that is, 30/09/1993 and 28/12/1993 on the reverse side of the second page of Ext.A1. On the other hand, the endorsements of the third and fourth

payments appear on the reverse side of the first page and the first two payments on the reverse side of the second page. The aforesaid aspects, according to the learned trial judge, probabalises the case of the defendant that her thumb impressions had been procured by force and compulsion. The learned counsel for the plaintiff/appellant takes serious exception to this finding of the trial court. Per contra, it was submitted by the learned counsel for the defendant/respondent that there is no infirmity in the judgment and cogent reasons have been given for arriving at the conclusion and hence no interference is called for.

9. The thumb impressions of the defendant seen in Ext.A1 do

appear to be smudged. It is true that the thumb impressions of the defendant seen in Ext.A1 was never shown to PW1 and his explanation sought as to why they appear smudged. No question was also put to PW1 on the said aspect. It is also true that the other reason given by the trial court, that the endorsements regarding the payments alleged to have been made by the plaintiff and endorsed in Ext.A1 are not in seriatim/order, can also be not the sole ground to dismiss the suit. But it can certainly be one of the grounds among the other grounds of suspicion if any, available, from the materials on record. Therefore, let me examine whether apart from the aforesaid grounds stated by the trial judge, there are any other reason(s) to doubt the case of the plaintiff. No doubt in a suit for specific performance, the burden is on the plaintiff to establish the execution of the sale agreement as well as the fact that the plaintiff was ready and willing to perform his part of the contract. Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed based on weakness of the other party. (Rangammal v. Kuppuswami, (2011)12 SCC 220:

AIR 2011 SC 2344).

9.1. Further, there is an essential distinction between burden of proof

under Section 101 and onus of proof under Section 102 of the Evidence Act. The burden of proof always lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. Burden of proof has two distinct meanings, namely, (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. S.101 deals with the former and S.102 with the latter. The first remains constant but the second shifts. When evidence has been adduced by both the parties the question of onus of proof pales into insignificance and the Court will have to decide the question in controversy in the light of the evidence on record. (A.Raghavamma v. A.Chenchamma, AIR 1964 SC 136; Rebti Devi v. Ram Dutt, 1997 KHC 1299: AIR 1998 SC 310 and Jagan Nath v. Jagdish Rai, AIR 1998 SC 2028).

10. Here the defendant admits the thumb impressions seen in

Ext.A1. But she takes up a case that she was forced to affix her thumb impressions on blank papers. Therefore, a duty was cast on the plaintiff to dispel the said vitiating ground raised by the defendant. Here the plaintiff does not enter the witness box for which no reasons have been given. Of course PW1, the brother of the plaintiff, examined on his behalf deposed that the latter was laid up due to arthritis and had difficulty in speaking. Apart from the said oral assertion made by PW1, no medical evidence has been produced to substantiate the same. It was pointed out by the learned counsel for the plaintiff/appellant that there is no complete bar for a power of attorney to depose on behalf of the plaintiff. Here is a case where PW1 personally knows the details of the transaction and hence he is competent to depose, and so no adverse inference is to be drawn against the plaintiff for not entering the witness box, goes the argument. Here, I refer to the dictum of the Apex Court in Man Kaur v. Hartar Singh Sangha, (2010)10 SCC 512: 2010 KHC 4741, wherein the position as to who should give evidence in regard to matters involving personal knowledge have been summarised thus- (a) An attorney holder who has signed the plaint and instituted the suit, but has no

personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit. (b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved. (c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge. (d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence regarding the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders. (e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder. (f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined. (g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his state of mind or conduct, normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his bona fide need and a purchaser seeking specific performance who has to show his readiness and willingness fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted, and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or readiness and willingness. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old

and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

11. The case of the plaintiff obviously falls under clause (g) referred

to in the decision. However, his case does not fall under the recognized exception to the requirement stated in clause (g). The plaintiff has never a case that PW1, his brother, was exclusively managing his affairs. A reading of the plaint shows that it was the plaintiff who was managing his affairs and there is no reference to any role of PW1 in the transaction. The plaintiff does not enter the witness box, for which no cogent reasons are given. Where a party to the suit does not appear in the witness box and state his own case on oath and does not offer himself to be cross - examined by the other side, a presumption would arise that the case set up by him is not correct (*Mohinder Kaur v. Sant Paul Singh*, 2019 KHC 6995: (2019)9 SCC 358).

12. Further, PW1 in the box asserts that the defendant executed

Ext.A1 agreement. The specific case of the defendant on the other hand is that the plaintiff along with her two other sons, namely, PW1 and DW5, had forcibly taken her to an unknown place and taken her thumb impressions in certain blank papers, which was later on fabricated into Ext.A1 agreement. DW5, who had initially filed written statement in O.S.No.344/1997, the connected suit filed by the defendant/mother, supporting the case of the plaintiff herein, when examined supported the case of the defendant/his mother. He deposed that his mother had not executed Ext.A1 agreement; that the property is in the possession and enjoyment of the mother; that he along with the plaintiff, and PW1 had obtained their mother's thumb impressions on some papers and stamp papers and that using the said papers, Ext.A1

agreement was created with the help of Premanandan, a scribe. The testimony of DW5 has not been discredited in any way. In such circumstances, the onus has again shifted to the plaintiff to establish his case relating to execution of Ext.A1 agreement. PW1 also admits that Ext.A1 agreement had been prepared by Premanandan. There are two witnesses also to Ext.A1 agreement. However, none

of the said persons have been

examined, for which no reasons have been given. PW1 in the cross examination has a case that the whereabouts of the scribe, is not known. However, no attempts are seen made to take out summons in the last known address of the scribe. Apart from the oral assertion made by PW1 in the box that the whereabouts of the scribe is not known, no attempt is seen made by the plaintiff to get the presence of scribe before the court. If the scribe was not available, then at least one of the attesting witnesses could have been examined to establish the case of the plaintiff. But for the reasons best known to the plaintiff, the said witnesses have also not been examined.

13. Now coming to the question whether the plaintiff was ready and

willing to perform his part of the contract. The defendant says that the plaintiff did not have the financial capacity to pay the amounts claimed to have been paid by him. PW1 admits that he is not a witness to Ext.A1 agreement. According to him, apart from an amount of 50,000/-, the entire amount agreed to be paid by the plaintiff as per Ext.A1 has been paid to the defendant. He also claims that he was present when the said amounts were paid. According to PW1, out of the amounts paid by the plaintiff, 28,000/- was given by him to the plaintiff. He also says that the said amount has not been returned by the plaintiff and that when the said amount was given, a receipt had been given by the plaintiff. However, the said receipt has also not been produced before the court. PW1 has also a case that the plaintiff had sold some paddy land and that the consideration received for the same was also utilized for payment of the sale consideration to the defendant. However, the said sale deed has also not been produced. Here I refer to the dictum of the Apex Court in Gopal Krishnaji Ketkar v. Mohamed Haji Latif, AIR 1968 SC 1413 wherein it has been held that even if the burden of proof does not lie on a party, the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts in issue. It is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which would throw light upon the issues and controversy

and to rely upon the abstract doctrine of onus of proof. In such circumstances, an adverse inference can certainly be drawn against the person who is withholding the best evidence.

14. In this case, the burden was always on the plaintiff to establish his case. However, in spite of better evidence being available, the plaintiff

did not chose to produce them. The prima facie burden to establish execution of Ext.A1 agreement and the readiness and willingness on the part of plaintiff, has not been established and it is only when that is established, the said burden would stand discharged and the onus would shift to the defendant to make out his case. That exercise has not been completed by the plaintiff in this case. When the learned counsel for the plaintiff/appellant was asked as to why the scribe or the witnesses to Ext.A1 were not examined and also the document relating to the sale of paddy land belonging to him to show his financial capacity was not produced, submitted that an opportunity may be given to adduce further evidence and requested for a remand of the matter. It is too late in the day to ask for a remand of the case. The suit is seen filed in the year 1994. 29 years have elapsed since the filing of the suit. This is not a case where the plaintiff was not given opportunity to adduce evidence to establish his case. That being the position, the request for remand cannot be allowed. Therefore, I concur with the conclusion of the trial court that the plaintiff is not entitled to the relief of specific performance prayed for, though on different grounds.

In the result, the appeal is dismissed. No costs. Interlocutory applications, if any pending, shall stand closed. Sd/- C.S.SUDHA JUDGE ami/

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