

Chummar, vs Franko

Chummar, vs Franko

SooperKanoon Citation : sooperkanoon.com/1440248

Court : Kerala

Decided On : Jun-06-2022

Judge : Honourable Mr. Justice P.Somarajan

Appeal No. : AS/549/2001

Appellant : Chummar,

Respondent : Franko

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.SOMARAJAN
MONDAY, THE 6TH DAY OF JUNE 2022 / 16TH JYAISHTA, 1944 AS
NO. 549 OF 2001 AGAINST THE JUDGMENT AND DECREE DATED
29-3-2001 IN OS APPELLANTS/ADDITIONAL DEFENDANTS 5 AND 6 :
1 CHUMMAR, BUSINESS, S/O. AKKARA CHAKKU, OLLUR VILLAGE,
DESOM, THRISSUR TALUK. 2 ANITHA,W/O.AKKARA CHUMMAR,
OLLUR VILLAGE, DESOM, THRISSUR TALUK. BY ADVS.
SRI.H.HAMZA ROWTHER SRI.ADARSH KUMAR
SRI.V.K.PEERMOHAMED KHAN SRI.K.M.ANEESH SRI.K.SANTHOSH
KUMAR (KALIYANAM) SRI.BIJU VARGHESE ABRAHAM SRI.DILEEP
CHANDRAN SRI.SHASHANK DEVAN RESPONDENTS/(PLAINTIFFS &

DEFENDANTS 1 TO 4, 7 TO 14) : 1 FRANKO JOSE, BUSINESS, S/O MUNDAN KURIAN JOSE, ANCHERRY DESOM, OLLUR VILLAGE, THRISSUR TALUK. 2 VISWANATHA IYER, (DIED) BUSINESS, S/O. THRITHALA PUTHEN MADATHIL PARAMESWARAN IYER, THRISSUR VILLAGE,DESOM, THRISSURE TALUK.

DEATH OF 2ND RESPONDENT IS RECORDED AS PER ORDER

DATED 3-2-2012 IN MEMO BEARING CF NO.538/2017 DATED 25-01-2017. A.S Nos.474 & 549 of 2001 2

*3 SEETHALAKSHMI, W/O. LATE THRITHALA PUTHEN MADATHIL SIVARAMAKRISHNA IYER XXIX/220, NEAR VEVEKODAYAM SCHOOL, THRISSUR VILLAGE THRISSUR TALUK. *4 PARAMESWARAN, BUSINESS, S/O. THRITHALA PUTHEN MADATHIL SIVARAMAKRISHNA IYER, XXIX/220,NEAR VEVEKODAYAM SCHOOL, THRISSUR VILLAGE THRISSUR TALUK. 5 KRISHNAN, BUSINESS, S/O. LATE THRITHALA PUTHAN MADATHIL SIVARAMAKRISHNA IYER, XXIX/220,NEAR VEVEKODAYAM SCHOOL, THRISSUR VILLAGE THRISSUR TALUK. *6 SEETHALAKSHMI AMMAL,@ PAPPA, D/O. LATE THRITHALA PUTHAN MADATHIL SIVARAMAKRISHNA IYER,THRISSUR VILLAGE, DESOM, THRISSUR TALUK. *7 ALAMELU AMMAL @ VASANTHA, -DO- -DO- *8 SANKARI AMMAL, -DO- -DO- *9 SEETHA AMMAL, -DO-0 -DO- *10 RUGHMANI AMMAL, THANKAM, -DO- -DO- *11 PARVATHY AMMAL @ SWARNAM, -DO- DO- *12 SUNDARI AMMAL, -DO- -DO- *13 LATHA @ LALITHAMMAL,

* -DO- -DO- THE NAME OF THE RESPONDENTS 3,4, AND 6 TO 13 ARE STRUCK OFF FROM THE PARTY ARRAY AT THE RISK OF THE PETITIONERS VIDE ORDER DATED A.S Nos.474 & 549 of 2001 3

ADDITIONAL RESPONDENTS 14 TO 20 IMPLEADED : 14 V. SEETHA,AGED 75 YEARS, W/O. VISWANATHA IYER, PARASAKTHI,

THIRUVAMBADY, THRISSUR-680022. 15 SEETHALAKSHMY T.V, AGED 52 YEARS, D/O. VISWANATHA IYER, PARASAKTHI, THIRUVAMBADY, THRISSUR-680022. 16 PARAMESWARAN T.V.(EXPIRED), AGED 49 YEARS, S/O. VISWANATHA IYER, PARASAKTHI, THIRUVAMBADY, THRISSUR-680022. 17 VISWANATHAN T.V, AGED 47 YEARS S/O. VISWANATHA IYER, PARASAKTHI, THIRUVAMBADY, THRISSUR-680022. 18 RAJESWARY T.V, AGED 45 YEARS, D/O. VISWANATHA IYER, VIJAYA NIVAS, S R M ROAD, ERNAKULAM NORTH. 19 HARIHARAN T. V, AGED 42 YEARS, VIJAYANIVAS,S R M ROAD, ERNAKULAM NORTH. 20 LALITHAMBAL T.V, AGED 40 YEARS, D/O. VISWANATHA IYER, VIJAYA NIVAS, S R M ROAD, ERNAKULAM NORTH.

(LEGAL HEIRS OF DECEASED 2ND RESPONDENT ARE IMPEADED AS ADDITIONAL RESPONDENTS 14 TO 20 VIDE ORDER DATED 4/4/2019 IN IA 596/2018.) R1 BY ADV SRI.K.G.BALASUBRAMANIAN THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 06.06.2022, ALONG WITH AS.474/2001, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: A.S Nos.474 & 549 of 2001 4

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.SOMARAJAN MONDAY, THE 6TH DAY OF JUNE 2022 / 16TH JYASHTA, 1944 AS NO. 474 OF 2001 AGAINST THE DECREE DATED 29-3-2001 IN OS 838/1995 OF PRINCIPAL SUB COURT, THRISSUR. PLAINTIFF/APPELLANT : FRANKO JOSE, S/O. MUNDAN KURIAN JOSE, 27-577/4, KURIAN VAKIL ROAD, CHEMBUKKAVU, THRISSUR - 20, REPRESENTED BY POWER OF ATTORNEY, M.A. JOSE, RESIDING -DO- -DO-. BY ADVS. SRI.K.G.BALASUBRAMANIAN SRI.V.BIJU JOSEPH RESPONDENTS/DEFENDANTS:

*1 VISWANATHA IYER, S/O. THRITHALA PUTHEN MADATHIL PARAMESWARA IYER, THRISSUR VILLAGE AND DESOM,

THRISSUR TALUK. (DIED- LRS RECORDED) 2 SEETHALAKSHMI, W/O. LATE THRITHALA PUTHEN MADATHIL SIVARAMAKRISHNA IYER, XXIX/220, NEAR VIVEKODAYAM SCHOOL, THRISSUR VILLAGE, THRISSUR TALUK. 3 PARAMESWARAN S/O. -DO- -DO-, -DO-. 4 KRISHNAN S/O. -DO-, -DO-, -DO- 5 CHUMMAR, S/O. AKKARA CHACKU, OLLUR VILLAGE & DESOM, THRISSUR TALUK.

A.S Nos.474 & 549 of 2001 5

6 ANITHA, W/O. AKKARA CHUMMAR, OLLUR VILLAGE & DESOM, THRISSUR TALUK. 7 SEETHALAKSHMI AMMAL @ PAPPA, D/O THRITHALA LATE PUTHEN MADATHIL SIVARAMAKRISHNA IYER, XXIX/220, NEAR VIVEKODAYAM SCHOOL, THRISSUR VILLAGE, THRISSUR TALUK. 8 ALAMELU AMMAL @ VASANTHAI, D/O. -DO-, -DO-, -DO-. 9 SANKARI AMMAL, D/O. -DO-, -DO-, -DO-. 10 SEETHA AMMAL, D/O. -DO-, -DO-, -DO-. 11 RUGHMANI AMMAL @ THANKAM, D/O. -DO-, -DO-, -DO-. 12 PARVATHY AMMAL @ SWARNAM, D/O. -DO-, -DO-, -DO-. 13 SUNDARI AMMAL, D/O. -DO-, -DO-, -DO-. 14 LELITHAMMAL @ LATHA, D/O. -DO-, -DO-, -DO-. * IT IS RECORDED THAT THE FIRST RESPONDENT DIED AND HIS LEGAL HEIRS ARE ALREADY IN THE PARTY ARRAY AS R5 AND R6, VIDE ORDER DATED 12-11-2020 IN MEMO DATED 27-6-2019. BY ADVS.SRI.H.HAMZA ROWTHER SRI.ANEESH.K.M SRI.V.K.PEERMOHAMED KHAN SRI.ADARSH KUMAR SRI.K.SANTHOSH KUMAR (KALIYANAM) SRI.BIJU VARGHESE ABRAHAM SRI.DILEEP CHANDRAN SRI.SHASHANK DEVAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 06.06.2022, ALONG WITH AS.549/2001, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: A.S Nos.474 & 549 of 2001 6

P.SOMARAJAN, J.

JUDGMENT

These are the two appeals preferred by the respective parties viz., the plaintiff and the defendant Nos.5 and 6, against the same decree and judgment rendered by the trial court in a suit for specific performance and for partition, based on Ext.A2 agreement dated 12-09-1986, by which the parties have agreed to sell 4 cents of property within a time schedule of six months. An amount of Rs.24,500/- was initially received out of the sale consideration by way of advance. There are four proposed sellers with respect to the 4 cents of property and they are the co-owners of the property holding 1/4 th share each. On expiry of six months period as agreed into in Ext.A2 agreement the period was extended 26 times by endorsements on the reverse side of Ext.A2 agreement, A.S Nos.474 & 549 of 2001 7 spanning over a long period of in and around 9 years. It is thereafter, the plaintiff came up with a suit for specific performance of the contract against the first defendant and the subsequent alienees, the defendant Nos.5 and 6. During the interval of 26 extensions, an additional amount was also paid in piecemeal and thereby a total amount of Rs.49,500/- was paid to the four proposed sellers, including the first defendant. The legal representatives of deceased Narayana Swami Iyer and Natarajan, who were parties to Ext.A2 agreement holding 1/4th share each were not made as a parties to the suit. The trial court decreed the suit in part granting specific performance of the contract. The relief of partition was not granted by the trial court. Aggrieved by the same, the plaintiff came up in A.S No.474 of 2001. The defeated defendants 5 and 6, who are the subsequent transferees claiming under the first defendant also came up in A.S No.549 of 2001.

2. The decree and judgment of the trial court was

mainly assailed by the defendant Nos.5 and 6 on the A.S Nos.474 & 549 of 2001 8 ground that the plaintiff was not mounted on the box to give any direct evidence regarding the intention or mental element possessed by him in order to show and satisfy the ingredient which would constitute Section 16 of the Specific Relief Act,

namely readiness and willingness. The legal position is covered by a catena of decisions that readiness and willingness would constitute mental element and intention of the party as well and the burden lies on the person, who seeks specific performance of the contract as mandated under Section 16 of the Specific Relief Act. Instead of the plaintiff, the power holder alone mounted on the box and had given oral evidence as PW1, but that cannot be substituted in the place of the oral evidence to be tendered by the party concerned, especially when it involves the mental element and intention which would constitute readiness and willingness as mandated under Section 16 of the Act.

3. The learned counsel for the appellant/plaintiff in

A.S No.474 of 2001 relied on the following decisions in A.S Nos.474 & 549 of 2001 9 support of his arguments : Panchanan Dhara and Ors. v. Monmatha Nath Maity ((2006) 5 SCC 340), Balasaheb Dayandeo Naik v. Appasaheb Dattatraya Pawar ((2008) 4 SCC 464), Santoshamma v. Sarala (2020(5) KLT 645(SC), Narinderjith Singh v. North Star Estate Promoters Limited ((2012) 5 SCC 712, Ram Awadh and Ors. v. Achhaibar Dubey and Ors. ((2000) 2 SCC 428), B.Vijaya Bharathi v. P.Savitri and Ors.((2018) 11 SCC 761), N.P.Thirugnanam v. R.Jagan Mohan Rao and Ors. ((1995) 5 SCC 115), Azhar Sultana v. B.Rajamani and Ors. ((2009) 17 SCC 27).

4. It is submitted that it is not at all necessary

invariably in all cases to give direct evidence by the party who is seeking specific performance with respect to the ingredient which would constitute Section 16 of the Specific Relief Act and even it is permissible to A.S Nos.474 & 549 of 2001 10 gather the same from the attending circumstances. It is further submitted that the oral evidence tendered through the power holder referring the readiness and willingness stands supported by documentary evidence produced by them and as such, it has to be acted upon. Admittedly, the power holder is not a party to Ext.A2 contract or any of the extensions given under the above said agreement for 26 times. He is not a signatory or a party to any of the endorsements, which comes to 26 in number. In fact, no other satisfactory evidence was adduced regarding the mental element possessed by the plaintiff with respect to the two ingredients,

readiness and willingness as embodied under Section 16 of the Act. This has to be read along with the fact that the period of the agreement was extended for a long period of around 9 years by 26 times. Each and every endorsement and the circumstances under which the endorsement was made A.S Nos.474 & 549 of 2001 11 and the extension given should be specified and let in evidence directly by the plaintiff by giving a chance for cross examination to the opposite party, which was actually not done in the present case. The extension of a long period of 9 years by endorsement for 26 times, would itself speak volume about what is behind it. All the attending circumstances under which each and every extensions were given should be specified, pleaded and given in evidence by the plaintiff so as to satisfy that he was all along ready and willing to perform his part of contract.

5. Yet another crucial aspect was also brought to

the notice of this Court that by the time of long period of 9 years what is paid out of the sale consideration comes to Rs.49,500/- out of Rs.3,85,000/-. Necessarily, the plaintiff ought to have mounted on the box in order to give direct evidence and to testify by cross examination. A.S Nos.474 & 549 of 2001 12

6. Yet another reason is also available to non

suit the plaintiff regarding the relief of specific performance that out of 26 endorsements/extensions given, two or three endorsements alone were signed by all the parties. The remaining extensions were unilaterally done by the first defendant without the juncture of other co-owners of the property. It is clear that the extension unilaterally done by the defendant would operate only with respect to his 1/4 th share over the property. It is true that subsequently in the years 1994 and 1995, he had obtained three separate sale deeds with respect to the remaining 3/4 th share held by other co-owners under Exts.B8 to B10. Though the learned counsel advanced an argument based on the principle of feeding the grant by estoppel, I am of the view that it cannot be applied unless there is alienation, transfer without holding any right, title or interest over the property and it would come into A.S Nos.474 & 549 of 2001 13 operation when it was subsequently acquired by the seller. The doctrine of feeding the grant by estoppel can hardly be applied in a contract for sale especially when there is lack of the ingredient which

would constitute the mandate under Section 16 of the Specific Relief Act.

7. There is alternative relief of return of advance

amount with interest. But it is a case wherein, a total amount of Rs.49,000/- was paid in advance in piecemeal and the entire balance amount was deposited before the trial court for getting specific performance of the contract based on the impugned decree passed by the trial court. The learned counsel for the appellant in A.S No.549 of 2001 fairly submitted that the property is now worth more than Rs.75,00,000/-. Taking into consideration the advance amount given and also the decree granted by the trial court for specific performance of the contract for sale A.S Nos.474 & 549 of 2001 14 and subsequent deposit of the entire sale consideration by the plaintiff, I am of the view that discretion under Section 20 can be exercised relying on the legal position settled by this Court in Anappath Parakkattu Vasudevakurup and Others v. C.Haridasan (2021(6) KHC 656 and also by the Apex Court in Her Highness Maharani Shantidevi P.Gaikwad v. Savjibhai Haribhai Patel and Others (2001 KHC 1100 : AIR 2001 SC 1462 : (2001) 5 SCC 101) by ordering an amount of Rs.10,00,000/- (Rupees ten lakhs only) to the plaintiff without the liability of payment of interest for a period of three months from today and thereafter it will carry interest at 6% per annum till the date of recovery, besides, the decree for return of the advance amount, i.e., 1/4 th of the total advance amount of Rs.49,500/- and interest at the rate of 6% per annum from the date of suit till the date of recovery. The plaintiff is also entitled to get back all the deposits made in compliance with the impugned decree and the interest with A.S Nos.474 & 549 of 2001 15 all benefits accrued thereon. It is made clear that the tenancy right, if any, claimed by the plaintiff over the property will not stand affected by this judgment and hence the question is left open. Both the appeals are allowed in part accordingly. Sd/- P. SOMARAJAN, JUDGE amk

P.SOMARAJAN, J.

----- A.S Nos.474 & 549 of 2001 ----- Dated : 06-06-2022.

JUDGMENT

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