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Martin Vs. Devassy

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Court : Kerala

Decided On : Dec-19-2014

Judge : Honourable Mr.Justice P.N.Ravindran

Appellant : Martin

Respondent : Devassy

Judgement :

C.R. IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN & THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR FRIDAY, THE19H DAY OF DECEMBER201428TH AGRAHAYANA, 1936 RFA.No. 375 of 2014 () ----------------------- OS2552012 of ADDL.SUB COURT,PARAVUR APPELLANT(S)/DEFENDANT : -------------------------- MARTIN S/O.KUNJUVARIYATH, PULLAN VEETTIL, MAMBRA KARA PARAKKADAVU VILLAGE, ALUVA TALUK BY ADVS.SRI.K.ABDUL JAWAD SMT.VINEETHA V.KUMAR RESPONDENT(S/PLAINTIFF : -------------------------- DEVASSY S/O.THOMAS, KAVALAKKATT VEETTIL, MAMBRA KARA PARAKKADAVU VILLAGE, ALUVA TALUK, 683 579 R1 BY ADV. SRI.V.K.BEERAN (SR.) R1 BY ADV. SRI.V.P.REGHURAJ R1 BY ADV. SRI.PRATHAP PILLAI R1 BY ADV. SRI.V.SHYAM THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON3010-2014, THE COURT ON1912-14 DELIVERED THE FOLLOWING: C.R. P.N.RAVINDRAN & P.B.SURESH KUMAR, JJ.

JUDGMENT

P.B.Suresh Kumar, J.

The defendant in O.S. No.255 of 2012 on the file of the Court of the Subordinate Judge, North Parur, is the appellant. The plaintiff in the suit is the respondent.

2. The suit O.S.No.255 of 2012 was one for specific performance of an agreement for sale. The plaint schedule property belongs to the defendant. According to the plaintiff, there is a granite quarry in the neighbourhood of the plaint schedule property and he was conducting quarrying operations in the said quarry in partnership with others. It is stated in the plaint that the defendant used to create hurdles to the quarrying operations of the plaintiff and consequently, at the instance of the political leaders in the locality, there was a mediation talk and it was decided in the said mediation that the plaintiff shall purchase the plaint schedule property from the defendant for a sum of Rs.90,000/- per cent for the property and Rs.1,50,000/- for the building therein. According R.F.A.No.375 of 2014 2 to the plaintiff, in furtherance of the said decision, Ext.A2 agreement for sale was executed by the defendant on 23/12/2011, agreeing to sell the plaint schedule property to him and received a sum of Rs.12,00,000/- from him towards advance sale consideration. The case of the plaintiff is that when he requested the defendant to execute the sale deed of the property on 20/3/2012 pursuant to the agreement, the defendant caused to issue Ext.A3 lawyer notice stating that he had borrowed a sum of Rs.2,00,000/- from the plaintiff during December 2011; that a few blank signed stamp papers were entrusted to the plaintiff as security while borrowing the amount and that when he tendered the borrowed money, the plaintiff refused to return the blank signed papers for not acceding to his demand to pay interest at exorbitant rates for the amount borrowed from him. As per Ext.A3 lawyers notice, the defendant called upon the plaintiff to return the blank signed stamp papers claimed to have been entrusted to him. The plaintiff sent Ext.A4 reply to Ext.A3 notice, denying the transaction mentioned in Ext.A3 notice and

calling upon the defendant to execute the sale deed as per the terms of the agreement, on or before 10/5/2012. The suit was filed thereafter on 29/5/2012 alleging that the defendant has R.F.A.No.375 of 2014 3 refused to execute the sale deed as per the terms of the agreement.

3. The defendant filed a written statement denying the agreement for sale and reiterating the stand taken by him in Ext.A3 lawyer notice. According to him, there was neither any mediation talk nor any agreement for sale as alleged by the plaintiff. He also denied the receipt of the advance sale consideration pleaded by the plaintiff. On the other hand, it was pleaded by the defendant in the written statement that the agreement for sale relied on by the plaintiff is a document concocted by the plaintiff, making use of the blank signed stamp papers entrusted by the defendant, while borrowing money from him.

4. The plaintiff gave evidence as PW1. Two witnesses were examined on his side as Pws.2 and 3. The documents produced by the plaintiff were marked as Exts.A1 to A10. The defendant gave evidence as DW1. No other evidence was let in by the defendant.

5. The court below, on an elaborate consideration of the materials on record, found that the defendant had executed Ext.A2 agreement for sale in favour of the plaintiff and received Rs.12,00,000/- towards advance sale R.F.A.No.375 of 2014 4 consideration from him. The court also found that the plaintiff was ready and willing to perform his part of the agreement by paying the balance sale consideration within the time stipulated in the agreement, but the defendant refused to execute the sale deed as agreed upon by him in the agreement for sale. In light of the aforesaid findings, the suit was decreed granting the plaintiff a decree for specific performance as prayed for by him.

6. Heard Sri.K.Abdul Jawad, the learned counsel for the appellant and the learned Senior Counsel, Sri.V.K.Beeran for the respondent.

7. The learned counsel for the appellant contended that the suit for specific performance of Ext.A2 agreement for sale is not maintainable. According to the learned counsel, as per the terms of Ext.A2 agreement, the defendant was obliged

to execute the sale deed only before 1.3.2013 and therefore, the suit instituted prior to the said date, on 29.5.2012 was premature. He relies on the decision of this Court in Baby @ Varghese v. Gopakumar (2013(4) KHC834 in support of the said contention. The learned counsel for the appellant also contended that the evidence on record would not establish that the defendant had executed Ext.A2 agreement for sale as R.F.A.No.375 of 2014 5 contended by the plaintiff. According to him, the evidence would only disclose that Ext.A2 is a document concocted by the plaintiff making use of the blank signed stamp papers entrusted to him. To buttress the said argument, he also pointed out that the plaint schedule property was obtained by the defendant in his family partition and therefore, he would not have executed an agreement for the sale of the same, especially when he is residing in the residential building in the said property. The learned counsel for the appellant also pointed out that the impugned decision has been rendered solely based on Ext.A1 document signed by the parties for which there was no pleading in the plaint. The learned counsel for the appellant further argued that the decree for specific performance being a discretionary relief, at any rate, such a decree was not justified on the facts of the case.

8. After examining the trend of judicial opinion, in Vithalbhai (P) Ltd. v. Union Bank of India [(2005)4 SCC315, the Apex Court held that a suit based on a plaint which discloses a cause of action is not necessarily to be dismissed on trial solely because it was premature on the date of its institution, if by the time the written statement came to be filed or by the time the court is called upon to pass a decree, the R.F.A.No.375 of 2014 6 plaintiff is found entitled to the relief prayed for in the plaint. Paragraph 22 of the said judgment reads thus; "A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the court; the court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the court to grant decree or not. The court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in

such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non- maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the court shall not exercise its discretion in favour of decreeing a premature suit in the following cases: (i) when there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than R.F.A.No.375 of 2014 7 those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See Samar Singh v. Kedar Nath13.) One more category of suits which may be added to the above, is: where leave of the court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained" In Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited [(2013)1 SCC625, following the decision in Vithalbhai (P) Ltd. v. Union Bank of India (supra), the Apex Court held that a suit claiming a relief to which the plaintiff may become entitled to at a subsequent point of time, though may be termed as premature, yet, cannot per se be dismissed to be presented on a future date, for, the question of a suit being premature does not go to the root of the jurisdiction of the court. In Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited (supra), the suit dealt with was one for specific performance of an agreement for sale. In the context of such suits, it was also held by the Apex Court

in the said case that there is no provision in the Specific Relief Act, 1963 requiring a plaintiff claiming relief of specific performance to wait for the expiry of the term fixed for the performance of the contract in a situation where the defendant may have made his intentions R.F.A.No.375 of 2014 8 clear by his overt acts.

9. Coming to the facts of the case, as indicated above, the defendant has denied the very existence of the agreement for sale. In International Contractors Ltd. v. Prasanta Kumar Sur (deceased) and others [AIR 1962 SC77, the Apex Court held that if the seller in an agreement for sale denies the existence of the agreement, it amounts to a complete repudiation of the contract to sell and in such cases, no question of any formal tender of the balance amount to be paid by the buyer arises and that in cases where the contract is repudiated, the only question to be decided is whether the seller definitely and unequivocally refused to carry out his part of the contract. If a contract is repudiated, it involves repudiation of every clause of the contract, including the clause fixing the term for completion of the sale and therefore, there is no logic or reason to hold that in such cases, a suit for specific performance could be filed only after the expiry of the term fixed for completion of the sale. There is nothing on record to indicate that any irreparable prejudice or manifest injustice has been caused to the defendant on account of the suit having been filed before the date of expiry of the term fixed for completion of the sale. The defendant has also no case that any of R.F.A.No.375 of 2014 9 the situations referred to in Vithalbhai (P) Ltd. v. Union Bank of India (supra) which compel the Court to decline jurisdiction in such suits exist in this case. The contention of the defendant that the suit is premature and not maintainable is, therefore, unsustainable.

10. Coming to the decision in Baby @ Varghese v. Gopakumar (supra), it is seen that reliance is placed on the decision of the Apex Court in Jawahar Lal Wadhwa and another v. Haripada Chakroberty [AIR 1989 SC606. In that decision, the Apex Court held that where a party to a contract commits anticipatory breach of contract, the other party to the contract may either treat the breach as putting an end to the contract and sue for damages or choose to keep the contract alive till the time for performance and claim specific performance. The question that arose before the Apex Court in that case was whether in a case where the seller

repudiates the contract, the buyer should perform his part of the obligations under the contract before he seeks enforcement of the contract. It was in the course of deciding that issue, the aforesaid statement was made. It was following the decision of the Apex Court in Jawahar Lal Wadhwa and another v. Haripada Chakroberty (supra) that this Court held in Baby R.F.A.No.375 of 2014 10 @ Varghese v. Gopakumar (supra) that when the seller in an agreement for sale commits breach of contract before the expiry of the term stipulated for completion of the sale, the buyer can sue for specific performance only after the expiry of the term fixed for completion of the sale and therefore, the suit filed before the expiry of the said term is premature and not maintainable. We are unable to agree with the said inference of the learned single Judge, for, the question whether in a case where the seller repudiates the contract, the buyer should wait till the expiry of the term fixed for performance to seek enforcement of the contract did not arise for consideration in Jawahar Lal Wadhwa and another v. Haripada Chakroberty (supra). As indicated above, the question that arose in the said case was only whether in a case where the seller repudiates the contract, the buyer should perform his part of the obligations under the contract before he seeks enforcement of the contract. Though the decision of the Apex Court in Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited (supra) was brought to the notice of the learned Single Judge who rendered the decision in Baby @ Varghese v. Gopakumar (supra), the learned Single Judge did not follow the same on the ground R.F.A.No.375 of 2014 11 that the decision of the Apex Court in Jawahar Lal Wadhwa and another v. Haripada Chakroberty (supra) is a decision rendered by a bench consisting of three learned Judges, while the decision in Virgo Industries (Eng.) Private Limited v. Venturetech Solutions Private Limited (supra) was by a bench consisting of two learned Judges. We are unable to agree with the said reasoning also, as the questions decided by the Apex Court in those decisions were not one and same. The attention of the learned Single Judge was not invited to the decisions of the Apex Court in Vithalbhai (P) Ltd. v. Union Bank of India (supra). The effect of repudiation of a contract as explained by the Apex Court in International Contractors Ltd. v. Prasanta Kumar Sur (deceased) and others(supra) was also not brought to the notice of the learned Single Judge. We therefore, respectfully disagree with the view taken by the learned Judge in Baby

@ Varghese v. Gopakumar (supra) that a suit for specific performance instituted alleging breach of the terms of the contract before the expiry of the term prescribed for the completion of the sale is premature and not maintainable.

11. Coming to the factual findings rendered by the court below, there is no dispute as to the ownership of the R.F.A.No.375 of 2014 12 plaint schedule property. As indicated above, the case of the defendant is that Ext.A2 agreement for sale is a document concocted by the plaintiff, making use of the blank signed stamp papers entrusted to him by the defendant as security for the amounts borrowed from the plaintiff. In other words, while admitting his signatures in Ext.A2 agreement for sale, the defendant denies the execution of Ext.A2 agreement for sale. The plaintiff had deposed that when the defendant caused hurdles to the quarrying operations carried on by him, the political leaders in the locality including PW2, a former President of the Panchayat and PW3, a former Vice President of the Panchayat intervened and at their instance, a settlement was arrived at and it was as per the terms of the said settlement, Ext.A2 agreement for sale was executed by the defendant. The plaintiff has also deposed that the mediation talks took place on 6/11/2011 and Ext.A1 memorandum was prepared on that day evidencing the settlement, in the handwriting of Tomy, the brother of the defendant. He has deposed that on the date of Ext.A1, a sum of Rs.10,000/- was paid towards token advance and the balance advance of Rs.11,90,000/- was paid at the time of execution of Ext.A2 agreement for sale. The plaintiff has also deposed that at the R.F.A.No.375 of 2014 13 time of the settlement, the defendant wanted the teak tree standing in the property to be excluded from the purview of the agreement and accordingly a clause to that effect was also incorporated in Ext.A1 memorandum. Both the plaintiff and the defendant are signatories to Ext.A1 memorandum. In addition to the parties, PW2, PW3, one T.J.Johnson and one P.V.Thomas had also signed as witnesses to the said document. The said four persons are witnesses to Ext.A2 agreement for sale also. PWs.2 and 3 have given evidence in tune with the case set up by the plaintiff. Both of them deposed that they had intervened in the dispute between the plaintiff and the defendant and Ext.A1 memorandum of settlement was arrived at the mediation talks held on 6/11/2011 at the residence of the defendant in the presence of P.V.Thomas, the uncle of the defendant and Tomy, the brother of the defendant. They have also

deposed that it was pursuant to the said settlement, Ext.A2 agreement for sale was executed by the defendant. Both of them identified their signatures in Ext.A1 memorandum and Ext.A2 agreement for sale. Both the said witnesses have deposed about the exclusion of the teak tree standing in the property of the defendant from the purview of the agreement. There is no pleading in the written statement as to when the R.F.A.No.375 of 2014 14 sum of Rs.2,00,000/- was borrowed by the defendant from the plaintiff. There is also no pleading in the written statement as to the particulars of the signed blank stamp papers claimed to have been entrusted with the plaintiff by the defendant. The defendant had also not adduced any evidence to establish the loan transaction or the entrustment of blank signed stamp papers with the plaintiff. During cross-examination, though the defendant deposed that the sum of Rs.2,00,000/-was borrowed from the plaintiff for his brother-in-law, the defendant did not examine his brother-in-law at least to establish his case. There was no attempt on the part of the defendant to examine P.V.Thomas, the uncle of the defendant who was present at the time of the settlement or his brother who prepared Ext.A1 memorandum, to disprove the case set up by the plaintiff. It is common knowledge that one would attempt to avail a loan against the security of blank signed stamp papers only out of dire necessity. In the instant case, it was admitted by the defendant in cross examination that at the time when he claimed to have borrowed Rs.2,00,000/- from the plaintiff against the security of the signed blank stamp papers, he had Rs.12,00,000/- in his bank account. It is very difficult to believe the case of the defendant that he borrowed the sum of R.F.A.No.375 of 2014 15 Rs.2,00,000/- from the plaintiff against the security of the signed blank stamp papers at a time when he had Rs.12,00,000/- with him in his bank account. We are also not impressed by the argument of the learned counsel for the appellant that the plaint schedule property being one obtained by the defendant in his family partition, he would not have ventured to sell the same. On the other hand, the evidence tendered by the plaintiff and his witnesses appears to be convincing, especially the evidence tendered by the plaintiff and his witnesses as to the exclusion of the teak tree from the purview of the agreement. Had the agreement relied on by the plaintiff been a concocted one as claimed by the defendant, there would not have been a clause at all in that agreement to exclude the teak tree standing in the property, from the purview of

the agreement. As regards the contention of the appellant that there was no pleading in the plaint concerning Ext.A1 memorandum of understanding, it has to be mentioned that the purpose of the pleadings of the plaintiff is to enable the defendant to understand the case of the plaintiff and in so far as Ext.A1 was only a piece of evidence produced by the plaintiff to substantiate his case based on Ext.A2 agreement for sale, we do not think that want of pleading regarding Ext.A1 R.F.A.No.375 of 2014 16 memorandum of settlement would in any way affect the case of the plaintiff. As such, on an overall appraisal of the entire materials, we are of the view that the findings rendered by the court below that the defendant had executed Ext.A2 agreement for sale in favour of the plaintiff and received Rs.12,00,000/-towards advance sale consideration from him and that the plaintiff was ready and willing to perform his part of the agreement by paying the balance sale consideration within the time stipulated in the agreement are all correct and we, accordingly, confirm the same.

12. The argument of the learned counsel for the appellant that a decree for specific performance was not justified or warranted on the facts of the present case is also not of any substance. There is no material to indicate that the agreement confers any unfair advantage to the plaintiff or involves any hardship to the defendant which he did not foresee or that it is inequitable to order specific performance of the agreement in favour of the plaintiff. No other circumstance which would compel the court to decline the decree for specific performance sought for by the plaintiff in exercise of the discretion conferred under Section 20 of the Specific Relief Act, was also brought to our notice. R.F.A.No.375 of 2014 17 13. In the aforesaid facts and circumstances, we hold that there is no merit in the appeal. The same is, accordingly, dismissed. There will be no order as to costs. Sd/- P.N.RAVINDRAN, JUDGE. Sd/- P.B.SURESH KUMAR, JUDGE. tgs/smv (true copy)

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