

Raghunathan Nair, vs Bobby.a.Thomas,

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Court : Kerala

Decided On : Oct-28-2021

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice K. Babu

Appeal No. : RFA/21/2019

Appellant : Raghunathan Nair,

Respondent : Bobby.a.Thomas,

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE K. BABU THURSDAY, THE 28TH DAY OF OCTOBER 2021 / 6TH KARTHIKA, 1943 RFA NO. 21 OF 2019 AGAINST THE JUDGMENT IN OS 37/2012 OF SUB COURT, CHENGANNUR, ALAPPUZHA APPELLANT/PLAINTIFF IN O.S: RAGHUNATHAN NAIR, AGED 52 YEARS, S/O BHASKARAN NAIR, KONODOOR SIVAKRIPAYIL HOUSE, PARUMALA MURI, KADAPRA VILLAGE, PATHANAMTHITTA DISTRICT-689 626 BY ADVS. P.B.KRISHNAN SRI.P.M.NEELAKANDAN SRI.P.B.SUBRAMANYAN SRI.SABU GEORGE SRI.MANU VYASAN PETER RESPONDENTS/DEFENDANTS 1 TO 3 IN O.S:

1 BOBBY.A.THOMAS, AGED 45 YEARS S/O RENNY THOMAS, ARIKUPURATHU MANTHRAYIL VEEDU, PAVUKKARA MURI, KURATTISSERY VILLAGE, ALAPPUZHA DISTRICT-689 622 2 RENU THOMAS, AGED 65 YEARS W/O RENNY THOMAS, ARIKUPURATHU MANTHRAYIL VEEDU, PAVUKKARA MURI, KURATTISSERY VILLAGE, ALAPPUZHA DISTRICT-689 622 3 BINO A.THOMAS, S/O RENU THOMAS, ARIKUPURATHU MANTHRAYIL VEEDU, PAVUKKARA MURI, KURATTISSERY VILLAGE, ALAPPUZHA DISTRICT-689 622 BY ADVS. SRI.JACOB P.ALEX SRI.JOSEPH P.ALEX SHRI.MANU SANKAR P. THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD

ON 31.08.2021, THE COURT ON 28.10.2021 DELIVERED THE FOLLOWING:
'C.R'

JUDGMENT

K.BABU, J.

This appeal is directed against the judgment and decree dated 31.10.2018 passed by the Subordinate Judge's Court, Chengannoor in O.S.No.37 of 2012. The plaintiff who lost his case in the Court below, has preferred this appeal under Section 96 read with Order XLI Rule 1 of the Code of Civil Procedure, 1908 (for short, 'C.P.C').

2. The plaintiff instituted the original suit seeking specific performance of a contract in respect of the plaint schedule property.

3. Defendant No.2 is the mother of defendants 1 and 3.

They are the owners of the plaint schedule property. On 07.06.2010, defendants 1 and 2 entered into an agreement for sale in respect of the plaint schedule property with the plaintiff for a total consideration of Rs.50 lakhs. The agreement for sale was executed by defendants 1 and 2 with the knowledge and concurrence of defendant No.3, who was then working abroad. The time for performance was

fixed as 11 months. Defendants 1 and 2 received Rs.10 lakhs as advance on the date of the agreement, and thereafter, they received amounts on different dates totalling a sum of Rs.31 lakhs. The date of performance of

the agreement was extended to 30.11.2011. Subsequently, on 03.08.2010, defendants 1 and 2 received Rs.3 lakhs more from the plaintiff and executed a document acknowledging the receipt of the amount. Thereafter, the defendants did not come forward to execute the sale deed, in spite of repeated demands of the plaintiff. The defendants instituted O.S.No.308 of 2011 and obtained an interim injunction to restrain the plaintiff from

entering into the plaint schedule property. Even after that, the defendants sought time for performing the agreement for sale. But at the same time, they tried to sell off the properties to third parties, against which the plaintiff filed a suit to restrain them from alienating the property to others in violation of the agreement for

sale. The plaintiff has always been ready and willing to perform his part of the agreement by paying the balance sale consideration. The plaintiff intimated his readiness and willingness to the defendants, but they refused to perform their part of the contract. Hence the plaintiff instituted the original suit seeking specific performance of the contract.

4. Defendants 1 and 2 resisted the claim of the plaintiff.

They denied the execution of the agreement for sale. According to the defendants, the alleged sale agreement is a forged one made by the plaintiff using the blank signed stamp papers procured from the defendants when they borrowed a sum of Rs.25 lakhs from

him to discharge certain liabilities. The plaintiff had obtained papers with their signatures affixed in revenue stamps at the time of the abovesaid transaction. He had also obtained blank signed cheque leaves of the wife of defendant No.1. The defendants had paid a sum of Rs.30 lakhs as interest for the amount borrowed from the plaintiff. But the plaintiff demanded increase in interest and required the defendants to pay a further sum of Rs.31 lakhs to

clear the liability. The defendants never thought of selling the plaint schedule property to the plaintiff, which is worth more than Rs.50 lakhs. The plaint schedule property is the only asset of the defendants, where they are residing. Defendant No.3, who has a co-ownership right over the property, is not a party in the agreement for sale. Hence it cannot be executed. The defendants instituted O.S No.308 of 2011 to prevent the high-handedness of

the plaintiff under cover of the forged agreement for sale. The Plaintiff also filed O.S No.210 of 2012 to restrain them from alienating the plaint schedule property ignoring the forged agreement for sale. The plaintiff is not entitled to get specific performance as prayed for.

5. Defendant No.3 filed written statement contending that he

has no knowledge about the execution of the agreement in respect of the plaint schedule property. According to him, he never executed such an agreement for sale.

6. The parties went to trial with the following issues:

(1) Whether the defendants have executed any agreement in favour of the plaintiff for sale of the plaint schedule property?

(2) Whether the defendants have received Rs.31,00,000/- from the plaintiff towards sale consideration?

(3) Whether the plaintiff was ready and willing to perform his part of the contract?

(4) Whether there is sustainable cause of action for the suit?

(5) Whether the plaintiff is entitled to the relief of specific performance of contract, as prayed for?

(6) Relief And costs?

7. During trial PWs 1 to 3 were examined on the side of the plaintiff and DWs 1 to 6 were examined on the side of the defendants. Exhibits A1 to A6 were marked on

the side of the plaintiff. Exhibits B1, C1 to C4 and X1 to X5 series were also marked in evidence. After completion of the evidence, the matter

was posted for hearing on 26.10.2018. When the matter was taken up for hearing, the learned Sub Judge framed an additional issue which is of the following effect:

(i) Is the suit barred by Order II Rule 2 CPC?

8. On 27.10.2018, the matter was heard. On 31.10.2018, the suit was dismissed with the finding that the suit is not maintainable as it is hit by the provisions of Order II Rule 2 C.P.C.

9. Feeling aggrieved by the judgment dismissing the suit as not maintainable in view of the bar contained in Order II Rule 2 C.P.C, the plaintiff has approached this Court in this Regular First Appeal.

10. Heard Sri. P.B.Krishnan, the learned counsel appearing for the appellant/plaintiff and also Sri.Jacob.P.Alex, the learned counsel appearing for the respondents/defendants 1 and 2.

11. The learned counsel on both sides submitted arguments in extenso on the merit of the finding of the learned Sub Judge that the suit is hit by the provisions of Order II Rule 2 C.P.C.

12. The learned counsel for the appellant Sri.P.B.Krishnan

also contented that there is blatant illegality in the course adopted by the learned Sub Judge in not answering all the issues after the parties went on trial and limited his findings to the single issue as to whether the suit is maintainable or not in view of the bar contained in Order II Rule 2 C.P.C. The learned counsel strenuously argued that the course adopted by the Court below is totally in violation of the provisions contained in Order XIV Rule 2 C.P.C.

13. After framing the issues 1 to 6, both sides participated in

the trial, knowing fully well that an issue as to whether the suit is maintainable or not, in view of the bar contained in Order II Rule 2 C.P.C, had not been raised by

the Court below. It is evident that the defendants had voluntarily participated in the trial, knowing fully well that the issues initially framed did not contain the issue regarding the bar under Order II Rule 2 C.P.C. It is pertinent to note that, at the request of the parties, the evidence was closed,

and the matter was posted for hearing arguments. It was after that the learned Sub Judge framed an additional issue as to the maintainability of the suit as provided in Order II Rule 2 C.P.C.

14. The fundamental issue as raised by the learned counsel for the appellant, Sri.P.B.Krishnan, is that whether the course adopted by the Court below falls foul of Order XIV Rule 2 of the C.P.C.

15. It is useful to extract Order XIV Rule 2 of the C.P.C, which reads thus:

2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same

suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to,-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time

being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

16. Sub-rule (1) of Order XIV Rule 2 says that

notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues. Sub-rule (2) goes to say that where issues both of law and of fact arise in the

same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court or a bar to the suit created by any law for the time being in force.

17. It is obligatory as per Order XIV Rule 2 C.P.C that the Court to try issues relating to jurisdiction or relating to a bar to the suit as a preliminary one and only thereafter to deal with other

issues of fact. In other words, where issues of law and fact are

framed in a suit, those relating to law, if it relates to jurisdiction and bar to the suit, be tried first. This view is fortified by the decision of a Division Bench of this Court in Prasad v. Travancore Devaswom Board [2017 (4) KLT 468].

18. In the instant case, the question as to whether the suit is

barred under Order II Rule 2 C.P.C was not originally framed, and the Court below proceeded to try the issues of facts and thereafter, after completion of evidence and after giving opportunity to parties to address arguments on the issues of facts proceeded to frame an issue relating to a bar of the suit as provided in Order II Rule 2 C.P.C.

19. Going by the evidence on record and the proceedings in

the Court below, it is indisputable that the parties initially participated in the trial with intent to obtain adjudication of the disputes between them on merits without depending on the maintainability of the suit as provided in Order II Rule 2 C.P.C.

20. In Prasad v. Travancore Devaswom Board (supra)

the Division Bench of this Court had considered a case in which the parties were allowed to lead evidence on all the issues of facts, and later, the trial court dismissed the suit on a question relating to jurisdiction without framing an issue on that. In the facts of that case, the Division Bench held that the course adopted by the Court below therein was in violation of Order XIV Rule 2 of the C.P.C.

21. Admittedly, several factual and legal contentions were urged before the trial court.

22. In *M/s. Fomento Resorts and Hotels Ltd v. Gustavo*

Ranato da Cruz Pinto and others [AIR 1985 SC 736] a three Judge Bench of the Apex Court held that in a matter where several contentions, factual and legal, are urged when there is a scope for an appeal from the decision of the Court, it is desirable as was observed by the Privy Council a long time ago to avoid delay and protraction of litigation that the Court should when dealing with any matter dispose of all the points and not merely rest its decision on one single point.

23. In *Chandradhoja Sahoo v. State of Orissa and*

others [AIR 2013 SC 367] the Apex Court held that a fundamental principle of law is that all courts whose orders are not final and appealable, should decide the lis before it on all issues as may be raised by the parties though in its comprehension the same can be decided on a single or any given issue without going into the other questions raised or that may have arisen. Such a course of action is necessary to enable the next Court in the hierarchy to bring the proceeding before it to a full and complete

conclusion instead of causing a remand of the matter for a decision

on the issue(s) that may have been left undetermined as has happened in the present case. The above may provide a small solution to the inevitable delays in rendering the final verdict in a given case.

24. In *Management of the Goodwill Girls High School*

and another v. J.Mary Susheela (SMT) and others [(2003) 9 SCC 106] the Apex Court while considering a case in which more than one issue were framed, but the trial Court decided the suit only on one issue, held that the trial Court should have adjudicated all the issues and it having not done so the affected party was

prejudiced. The Apex Court considered the legality of the judgment

under challenge therein in dealing with several issues when the trial Court had dealt with only one issue and directed the matter to be remitted to the trial Court for consideration afresh.

25. In the instant case, the appellant/plaintiff has suffered material prejudice due to the irregularity committed by the trial Court.

26. We are of the considered view that the Court below

committed illegality by dismissing the suit on the only issue relating to the bar contained in Order II Rule 2 C.P.C without considering this issue first and permitting the parties to participate in the trial on all other issues of facts. We have no hesitation in holding that the course adopted by the trial court is blatantly illegal.

27. Yet another aspect that requires consideration is that the course adopted by the Court below has left the plaintiff without room for answering the issue as to whether the suit is barred under Order II Rule 2 C.P.C.

28. The learned counsel for the appellant/plaintiff Sri.P.B.Krishnan has taken us to the written statement filed by the

defendants wherein there is no pleading regarding the bar of Order

II Rule 2 C.P.C in filing the suit. The learned counsel contended

that in the absence of specific pleading regarding the bar of Order

II Rule 2 C.P.C in the written statement, the plaintiff had to meet the additional issue by surprise.

29. Per Contra, Sri.Jacob.P.Alex, the learned counsel for the respondents/defendants, submitted that the plea of the bar of

Order II Rule 2 C.P.C was implied in the pleading in the written

statement to the effect that the suit is not maintainable.

30. The function of pleadings is to ascertain with precision

the matters on which the parties differ and the points on which they agree; and thus to arrive at certain clear issues on which both parties desire a judicial decision.

31. The sole object of the system of pleading is to secure

that both the contending parties shall know what are the real points of controversy between them in order that they may have an opportunity to bring forward such evidence or to submit such argument as may be appropriate to determine such points at issue between them, and to prevent surprise at the trial.

32. In Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice (Twenty Second Edition, Page No.87) on the function of pleadings, the learned authors write thus:

The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross-claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what they are fighting about, otherwise they may go to

great expense in procuring evidence to prove at the trial facts

which their opponents will at once concede. It has been found by long experience that the most satisfactory method of attaining this object is to make each party in turn state his own case and answer that of his opponent before the hearing. Such statements and the answers to them are called the pleadings.

33. In Ram Sarup Gupta (dead) by L.Rs. v. Bishun

Narain Inter College and Others [AIR 1987 SC 1242], the Apex Court held that in the absence of pleading, evidence, if any, produced by the parties cannot be considered and that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The Apex Court further held that the object and purpose of pleading are to enable the adversary party to know the case it has to meet, and in order to have a fair trial, it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise.

34. The Constitution Bench of the Apex Court in Gurbux

Singh v. Bhooralal [AIR 1964 SC 1810], while considering the issue of Order II Rule 2 C.P.C held that as the plea is a technical bar, it has to be established satisfactorily and cannot be presumed merely on the basis of inferential reasoning.

35. In Dalip Singh v. Mehar Singh Rathee and Others

[(2004) 7 SCC 650], the Apex Court held that in the absence of pleadings or the issue regarding the bar of Order II Rule 2 C.P.C in filing the suit, the appellant cannot be permitted to raise such a plea.

36. In the instant case, not only that there was no specific

pleading as to the bar under Order II Rule 2 C.P.C in the written statement, but the Court below framed an additional issue regarding the bar under Order II Rule 2 C.P.C after posting the matter for final hearing on 26.10.2018, thereby the plaintiff was taken by surprise to meet the additional issue. It is surprising to notice that on 27.10.2018 itself, the matter was finally heard and the suit was dismissed on 31.10.2018, finding that the suit was hit

by the provisions of Order II Rule 2 C.P.C leaving all other issues

originally framed unanswered. We are constrained to conclude that the learned Sub Judge lost sight of the salutary principles of a fair trial.

37. In view of the findings arrived at above, we deem it

appropriate that we shall not record any finding on the merit of the contentions raised by the parties on the question of bar contained in Order II Rule 2 C.P.C.

38. We have carefully gone through the entire proceedings.

We are satisfied that there has been no complete or effectual adjudication of the proceedings, and the irregularity committed by the Court below has caused material prejudice on that account to the appellant/plaintiff.

39. In *Shankararamiah.A v. M.S.Lakshminarayanamoorthi*

and others [2016 (5) KHC 87] the Apex Court held that an order

remanding a proceeding may ordinarily be made under Order XLI Rule 23 of the Code of Civil Procedure when the Trial Court has decided the case on a preliminary point and the Appellate Court reverses the decision of the Trial Court. An order of retrial after remand may also be made in exercise of the inherent jurisdiction of the Court where the Court of appeal is satisfied that there has been no proper trial or no complete or effectual adjudication of the proceeding and the party complaining of the error or omission or irregularity has suffered material prejudice on that account. Such an order may also be made to prevent abuse of the process of Court . But power to order retrial after remand, where there has already been a trial on evidence before the Court of first instance, cannot be exercised merely because the Appellate Court is of the view that the parties who could lead better evidence in the Court of first instance have failed to do so. A trial de novo, after setting aside a final order passed by the Court of first instance may therefore be made in exceptional circumstances, where there has been no real trial of the proceeding, or where allowing the order to stand would result in abuse of the process of Court.

40. In the present case, the trial Court has decided the case on a preliminary point after framing several other issues of facts, leaving all other issues unanswered. We have found that the course adopted by the trial court is illegal. We have also found that there has been no proper trial or no complete or effectual adjudication

of the proceedings, and thereby, the appellant/plaintiff has suffered material prejudice.

41. The upshot of the above discussion is that the original suit is liable to be remanded to the Court below for trial afresh. The decree and judgment impugned are liable to be set aside.

42. We are of the view that the remand was caused not by the fault of the appellant/plaintiff, and hence the appellant is entitled to a refund of the court fee. In the result,

(i) The appeal is allowed by way of remand.

(ii) The judgment and decree dated 31.10.2018 in O.S No.37 of 2012 on the file of Subordinate Judge's Court, Chengannur are set aside.

(iii) The O.S No.37 of 2012 is remanded to the Court below for trial afresh.

(iv) Both sides are at liberty to adduce additional evidence.

(v) The Court below will complete the trial of the case and

pass revised judgment and decree expeditiously as possible at any rate within a period of three months from the date scheduled for the appearance of the parties before the trial court.

(vi) The court fee remitted by the appellant is ordered to be refunded to him as provided in Section 67 of the Kerala Court Fees and Suits Valuation Act, 1959.

(vii) The parties are directed to appear before the trial court on 30.11.2021. (viii) Registry will transmit the entire lower court records forthwith.

(ix) The parties are directed to bear their respective costs. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- K. BABU, JUDGE KAS

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