**Ummerkoya Vs. Lazar**

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**SooperKanoon Citation** : sooperkanoon.com/727229

**Court** : Kerala

**Decided On :** Oct-11-2004

**Reported in** : 2004(3)KLT807

**Judge** : K.S. Radhakrishnan and; K. Thankappan, JJ.

**Appeal No.** : A.S. No. 153 of 1997

**Appellant** : Ummerkoya

**Respondent** : Lazar

**Advocate for Def.** : S. Venkitasubramonia Iyer,; V. Giri and; K.P. Unnikrishn

**Advocate for Pet/Ap.** : T.K.M. Unnithan and; Mathew Ummen, Advs.

**Judgement** :

**K.S. Radhakrishnan, J.**

1. We may first examine the sustainability or otherwise of judgment in O.S.865 of 1990. The fate of CRP. 1136 & 1158 of 1999 depends upon the final decision in AS.153/97. AS. 153/97 arises out of the judgment and decree in OS. 865 of 1990, which was a suit filed by one Lazar for specific performance of an agreement dated 24.4.89. Lazar, the appellant is the respondent in both the Civil Revision Petitions. Suit was decreed in favour of Lazar and therefore he can defend the orders passed in CRP. 1136/99 and CRP. 1158/99.

2. Plaint schedule properties belonged to the defendants in the suit. One room in the building in the property was in the possession of one Vasu and the remaining portion of the building is in the possession of the plaintiffs as tenants. On 24.4.89 defendants 1, 3 and 4 as the first party and the plaintiff as the 2nd party entered into an agreement for sale of the property to the plaintiff for a sum of Rs. 1,65,000/- and the plaintiff has paid a sum of Rs. 25,000/- towards advance. The time stipulated in the agreement was six months. As second defendant was not available for executing the agreement, defendants 1, 3 and 4 have undertaken that second defendant will also execute the assignment deed. As per the default clause in the agreement, if the plaintiff commits default, defendants are entitled to appropriate the advance paid towards damages and if the defendants commit default, plaintiff is entitled to get back the advance amount of Rs. 25,000/- and another sum of Rs. 25,000/- towards damages. Plaintiff states that he was always willing to perform his part of the contract. Plaintiff's further case is that defendants 1, 3 and 5 have executed the agreement with the permission and as required by the 2nd defendant. Further, the plaintiff also stated that the second defendant had knowledge of the agreement and he had approved the same. Before the due date plaintiff sent a notice to the defendants in the name of 4th defendant on 20.10.89. Fourth defendant refused to accept the notice. Later defendants 1, 3 and 4 have colluded with Vasu and made him to file OS. 754/89 before the Sub Court, Thrissur and obtained an order of temporary injunction restraining the defendants from assigning the property to the plaintiff and restraining the plaintiff from purchasing the property. Plaintiff in this suit is the 5th respondent in that suit. We need not further elaborate the facts.

3. The suit was resisted by all the defendants. Joint written statement was filed by D1 and D4. They admitted that they have executed a karar in favour of the plaintiff. According to them, second defendant has no knowledge about the execution of the agreement and that second defendant was not present at the time of fixing the value of the property. They also denied the allegation that they had colluded with Vasu. Further it is also stated that plaintiff had no capacity to pay the balance consideration at that time and he was never ready to perform his part of the contract. Further they stated that since the property has already been assigned the plaintiff is not entitled to get any assignment deed executed in his favour. The

claim for damages is also disputed. Third defendant was set ex parte. Second defendant filed written statement. So also defendants 7 and 8. The Sub Court on the basis of the pleadings of the parties raised five issues and after considering the oral and documentary evidence and the pleadings of the parties decreed the suit for specific performance and defendants 1 to 4 were directed to execute assignment deed in favour of the plaintiff. Further, the Court also held that the second defendant is also bound by Ext. A1 agreement. Aggrieved by the same defendants 2, 4 to 8 have come up with this appeal.

4. Counsel appearing for the appellants Sri. T.K.M. Unnithan took strong exception to the manner in which the trial Court had dealt with the case as well as the manner in which the pleadings were appreciated. Counsel submitted there is total non-application of mind by the Appellate Court with pleadings of the parties as well as evidence adduced. Referring to paragraphs 3 and 5 of the judgment counsel submitted that non-application of mind is writ large on the judgment itself and considerable prejudice has been caused to the party by the mistake committed by the Court in disposing of the suit. Counsel submitted that the Court below had failed to take note of the written statement filed by defendants 7 and 8 for deciding the suit. Counsel appearing for the respondents Sri. S.V.S. Iyer tried to support the judgment on the basis of the pleadings and evidence adduced by the parties.

5. We are of the view the Court below has committed a grave error in stating that the second defendant did not file any written statement. In fact 2nd defendant had filed a written statement on 6.9.1991. Sub Judge also stated that defendants 7 and 8 also did not file any written statement. In fact 7th defendant filed his written statement on 26.8.95 and 8th defendant filed written statement on 17.11.1995. The suit was disposed of by the learned Sub Judge on 18.1.1997. The statement in the judgment that 2nd defendant and defendants 7 and 8 did not file written statement is incorrect. We find that the learned Sub Judge had decided the suit without perusing the written statement filed by 2nd defendant and defendants 7 and 8. There is total non-application of mind by the Judicial Officer in stating that no written statement was filed by defendants 2, 7 and 8. Counsel for the appellants is right in his contention that because of the action of the Court prejudice has been caused to his parties. It is well settled proposition of law that

an act of Court shall not prejudice any party. The doctrine of actus curiae neminem gravabit is a maxim founded upon justice and good sense. This principle has been highlighted by the Apex Court in South Eastern Coal Fields Ltd. v. State of M.P., (2003) 8 SCC 648 and in Karnataka Rare Earth v. Senior Geologist, Dept. of Mines & Geology, (2004) 2 SCC 783. The Court held that the doctrine of actus curiae neminem gravabit is not confined in its application only to such acts of the Court which are erroneous, the doctrine is applicable to all such acts as to which it can be held that the Court would not have so acted had it been correctly apprised of the facts and the law. The said principle was followed by us in T.O. Alias and Ors. v. T.O. Abraham & Co. and Ors., 2004 (2) KLT 1044 = 2004 (2) KLJ 368.

6. We are of the view the statement of the Sub Judge that no written statement has been filed by second defendant as well as defendants 7 and 8 is clearly an error committed by the Court for which the parties shall not suffer. Learned Sub Judge has disposed of the case in a callous manner stating that no written statement has been filed by the parties. Learned Judge decided the case on merits, at the same time no reference was made to the written statement filed by defendants 2, 7 and 8 which has definitely caused prejudice to the parties. Learned Judge proceeded as if no written statements were filed. In fact written statements were on record.

7. Under such circumstance we are inclined to set aside the judgment and remit the matter back to the Sub Court for fresh disposal. We have already indicated that the fate of CRP.1136 and 1158 of 1999 depends upon the judgment in AS.153/97. Since we have already set aside the judgment the orders passed by the Rent Control Court in both the revisions have to be set aside. We do so and remit the matter back to the Rent Control Court for fresh consideration. Rent Control Court would await the decision of the Sub Court in OS. 865/90. Parties are directed to appear before the Sub Court on 15.11.2004. The Court would dispose of the suit finally within a period of four months thereafter.