

Aliyas Vs. Aboobacker

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Court : Kerala

Decided On : Jul-14-2006

Reported in : 2006(4)KLT282

Judge : R. Bhaskaran and; K.T. Sankaran, JJ.

Acts : [Specific Relief Act, 1963](#) - Sections 20 and 20(1)

Appeal No. : R.F.A. No. 173 of 2005

Appellant : Aliyas

Respondent : Aboobacker

Advocate for Def. : M. Sreekumar, Adv.

Advocate for Pet/Ap. : Ram Mohan G.,; G.P. Shinod and; Manu V., Advs.

Disposition : Appeal allowed

Judgement :

K.T. Sankaran, J.

1. The suit filed by the respondent herein for specific performance of Ext.A1 agreement for sale of the plaint schedule immovable properties was decreed by the trial court. The defendants challenge the judgment and decree of the trial court.

2. The plaint schedule consists of three items of properties, the total extent of which comes to 55 cents. Two items belong to the first defendant and one item having an extent of 15 cents belongs to the 2nd defendant. The 2nd defendant is the son of the first defendant. The properties are situated on the side of Vithure - Kallar road in Nedumangad Taluk. There is a house consisting of four bed rooms, sit out, dining room, kitchen and store room, in one of the items. There are coconut trees, other fruit bearing trees and miscellaneous trees in the properties.

3. The case of the plaintiff is that the defendants agreed to sell the plaint schedule properties to the plaintiff for a consideration of Rs. 7.5 lakhs and Ext.A1 agreement for sale was executed by the defendants on 8-3-2004. An advance of Rs. One lakh was paid on that day. The period fixed in the agreement to complete the transaction was two months. In spite of notice, the defendants did not execute the sale deed. The plaintiff was and continues to be ready and willing to perform his part of the contract. The suit was filed for specific performance of the agreement with an alternative prayer for realization of the advance amount with interest.

4. The defendants contended that they did not agree to sell the properties to the plaintiff nor did they execute Ext.A1 agreement. They contended that they had taken a loan from the Vithura branch of the Thiruvananthapuram District Co-operative Bank and for re-paying the loan amount, they had borrowed Rs. 75,000/- from the plaintiff. The plaintiff, who is a money lender, got the signatures of the defendants in a blank stamp paper and three plain papers. In the peculiar circumstances, the defendants signed the papers and borrowed the amount. Ext.A1 was fabricated using the signed blank papers. The defendants are residing in the house in the property. The properties would fetch a value of Rs. 35,000/- per cent of land and the total market value of the property would be Rs. 25 lakhs. In the reply notice itself, the defendants had expressed their willingness to re-pay Rs. 75,000/- with interest. It was contended that the plaintiff is not entitled to get a decree for specific performance.

5. Before the trial court, the plaintiff gave evidence as PW.1. The scribe of Ext.A1 was examined as PW.2 and the land broker who was instrumental to the agreement was examined as PW.3. On the side of the defendants, the 2nd

defendant was examined as DW.1. He expressed his willingness to pay Rs. One lakh with interest to the plaintiff.

6. The trial court found that Ext.A1 was executed by the defendants and that the agreement is a genuine one. The contention of the defendants that the case is one where the discretion is to be exercised by the court not to decree specific performance, was negatived on the ground that the defendants are not entitled to seek equity they having denied the execution of the agreement. It was held that in such a case, discretion could not be exercised in favour of the defendants.

7. The points arising for consideration are:

(1) Whether Ext.A1 agreement is genuine ?

(2) Whether the plaintiff is entitled to get a decree for specific performance ?

8. Point No. 1: To prove the execution of Ext.A1 agreement, PWs.2 and 3 were examined on the side of the plaintiff. PW.2 is a document writer and he is the scribe of Ext.A1. The evidence of PW.2 was believed by the trial court. PW.2 saw the executants signing the document and he is also a signatory. There is nothing to disbelieve the version of PW.2. PW.3 is a broker and he brought the buyer for the purchase of the properties. He also stated that Ext.A1 was written by PW.2 and the defendants put their signature in it. PW.3 signed as a witness in Ext.A1. The 2nd defendant, who was examined as DW.1, stated that a sum of Rs. 75,000/- was borrowed from the plaintiff on 3-3-2004 and blank signed papers were given to the plaintiff on that day. No transaction as alleged by the plaintiff took place on 8-3-2004. The amount borrowed from the plaintiff was utilised for discharging the loan in the District Co-operative Bank. The appellants have produced as additional evidence the pass book in respect of the loan. The pass book shows that a sum of Rs. 51,180/- was remitted in the loan account and it was closed. We are inclined to allow LA. No. 1157 of 2006 filed under Order XLI Rule 27 and the pass book is received in evidence and marked as Ext.B5. On a perusal of Ext.A1, it does not appear to be one written using blank signed papers. The defendants failed to establish that only blank papers were signed by them. It is also not established that the plaintiff is a money tender. It has come out in evidence that he is a

businessman. DW.1 stated that the defendants are prepared to suffer a decree for the alternative relief for return of Rs. One lakh in order to salvage their properties. We do not find any ground to upset the well considered finding of the court that Ext.A1 was executed by the defendants. Point No. 1 is answered in favour of the respondent-plaintiff.

9. Point No. 2: The trial court held that the plaintiff is entitled to get specific performance of Ext.A1. It Was held that the defendants are not entitled to invoke the discretion of the court under Section 20 of the Specific Relief Act not to decree specific performance, since they denied the execution of Ext.A1 agreement. The question to be considered is whether the view taken by the court below is correct.

10. Section 20 of the Specific Relief Act states that the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so. Section 20 also provides that the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles. The discretion to be exercised under Section 20 is to find out whether the suit is to be decreed for specific performance, though it is lawful to do so; or to find whether the discretion is to be exercised not to decree specific performance. The expression 'and the Court is not bound to grant such relief merely because it is lawful to do so', following the words 'the jurisdiction to decree specific performance is discretionary' makes the position clear. Even if it is lawful to decree specific performance, the court need not do so, if on exercising the discretion in the manner indicated in Section 20 the court comes to the conclusion that discretion is to be exercised not to decree specific performance. The scope and ambit of the discretion to be exercised under Section 20 is not to find out whether the conduct of specific performance' in the contingencies mentioned therein. We do not mean to say that the conduct of the defendant need not be looked into at all under any circumstances. We only venture to point out that the considerations to be made to exercise discretion are different. It is apposite to extract here Clause (a) of Sub-section (2) of Section 20.

(2) The following are cases in which the Court may properly exercise discretion not to decree specific performance:

(a) Where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant.

Clause (a) of Sub-section (2) of Section 20 mentions about the 'conduct of the parties'. But such conduct is referable to the point of time of entering into the contract. The conduct of the defendant in taking up unsustainable or untrue defence does not come under this clause. The words 'at the time of entering into the contract' in Clause (a) would indicate this. The scope of enquiry under Clause (a) is to find whether any of the three ingredients mentioned therein would give the plaintiff an unfair advantage over the defendant. If so, discretion is to be exercised not to decree specific performance.

11. As stated above, conduct of the defendant cannot be said to be totally out of place. The mandate in Section 20(1) that the discretion is not arbitrary but sound and reasonable, guided by judicial principles, would take in the principles of justice, equity and good conscience as well. It is trite that a person who seeks equity shall do equity. Here again, we are of the view, that the judicial principles are to be invoked to find whether the discretion is to be exercised to decree or not to decree specific performance. Equitable considerations are quite relevant in the realm of exercise of discretion. But the question is whether the unsustainable nature of the defence made by the defendant would be a ground for exercising discretion in favour of the plaintiff, on the ground that the defendant is precluded by his conduct from contending that discretion should not be exercised in favour of the plaintiff. A defendant may fail to prove his defence. He may not be able to bring before court the relevant evidence or proper witnesses. Sometimes, the defence may be false. In some cases, though the defence is true, the defendant may fail to prove it. In yet another case, the court may err in its finding that the defence is false or unsustainable. In our view, it cannot be said as a universal rule, that the defendant would be precluded from contending that discretion should be exercised not to decree specific performance or in other words discretion should not be exercised to decree specific performance, only because his defence is either unsustainable or not proved or false or because the court found it to be so. We are

also of the view that in such a case, the plaintiff could not say that the discretion should be exercised in his favour to decree specific performance only because of such a defence or such a finding of court. The court has to consider all the facts and circumstances of the case in order to exercise the discretion to decree or not to decree specific performance and in that process could take into account equitable considerations as well.

12. The learned Counsel for the respondent-plaintiff relied on the decision of this Court in *Balan v. Krishnan* 2002 (3) KLT 799 and contended that the defendants having raised unsustainable contentions, the discretion is to be exercised in favour of the plaintiff. In paragraph 14 of the judgment in Balan's case, it is stated: 'It is clear from the evidence on record that the deceased 1st appellant has raised unsustainable contentions to resist the performance of Ext.A1 agreement.' On the facts, it was held in paragraph 16 of the judgment that interests of justice would be better served by directing the appellants therein to execute the assignment deed in favour of the respondent therein. The deceased first appellant and the respondent therein are brothers. In the suit for specific performance, the defendant admitted the agreement but contended that the plaintiff had repudiated the contract and the advance amount was repaid to the plaintiff. Specific performance was decreed on the facts of that case and not on the ground that discretion should be exercised in favour of the plaintiff when the contentions raised by the defendant were found to be unsustainable.

13. In *Prasanna v. Sreedharan* 1995 (2) KLT 499, this Court dealt with a case where the defendant denied the receipt of advance amount under the agreement for sale and also contended that she was never aware of the contents of the agreement till the receipt of a letter demanding execution of sale deed. On facts, it was held that the contentions of the defendant were unsustainable and that the defendant executed the agreement fully knowing and understanding the contents therein. Still, this Court exercised the discretion not to decree specific performance. The decision of this Court in Prasanna's case was Confirmed in Appeal by the Supreme Court in *Kallathil Sreedharan and Anr. v. Kamnath Pandiyala Prasanna and Anr.* : (1996)6SCC218 .

14. In *Lourdu Mari David and Ors. v. Louis Chinnaya Arogiaswamy and Ors.* : AIR 1996 SC2814 , the Supreme Court dealt with the equitable consideration under Section 20 of the Specific Relief Act and held:

It is settled law that the party who seeks to avail of the equitable jurisdiction of a Court and specific performance being equitable relief, must come to the Court with clean hands. In other words the party who makes false allegations does not come with clean hands and is not entitled to the equitable relief.

15. In *Parakunnam Veetil Joseph's son Mathew v. Nedumbara Kuruvila's son and Ors.* 1988 (1) KLT 7 (SC) : 1987 (Supp) SCC 340, the Supreme Court considered the scope of enquiry under Section 20 of the Specific Relief Act and held thus:

Section 20 of the [Specific Relief Act, 1963](#) preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as instrument of oppression to have an unfair advantage to the plaintiff.

16. In *A.C. Arulappan v. Ahalya Naik.* : AIR 2001 SC2783 , the Supreme Court held:

If under the terms of the contract the plaintiff gets an unfair advantage over the defendant, the court may not exercise its discretion in favour of the plaintiff. So also, specific relief may not be granted if the defendant would be put to undue hardship which he did not foresee at the time of agreement. If it is inequitable to grant specific relief, then also the court would desist from granting a decree to the plaintiff.

17. In *Prasanna v. Sreedharan*: 1995 (2) KLT 499, this Court relied on the decision in *Lakshminarayana v. Singaravelu*: : AIR1963 Mad24 and held that when the plaintiff obtained a measure of unfair advantage over the defendant, by the terms of contract, specific performance should be refused. In *Lakshminarayana's* case, the Madras High Court, held thus:

It is clear that the court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered.'

'Any contract which gives one party an unfair advantage must fall under the category of contracts which could not be specifically enforced. This implies that the contracting parties were not at the time of the contract on equal bargaining terms.

The following passage in Prasanna's case indicates how this Court in that case exercised the discretion not to decree specific performance:

The contract covered the entire property of the defendants which is the only source of their livelihood. Obviously, the irresistible inference is that the defendant did not want to part with the property and did not intend to get the auction sale set aside solely for the benefit of a third party, namely, the plaintiffs. We are of the view that taking advantage of the situation in which the defendants as judgment-debtors were placed, the plaintiffs tried to secure for themselves the properties, not negotiating for them on equal terms.

18. In *Adimakutty Hydu Ali v. Ambujam*: : 2003(2)KLT328 , this Court held as follows:

Before decreeing specific performance, it is obligatory for courts to consider whether by doing so any unfair advantage would result for the plaintiff over the defendant, the extent of hardship that may be caused to the defendant and if it would render such enforcement inequitable, besides taking into consideration the totality of circumstances of each case.

19. In the present case, the property involved is the residential and only property of the defendants. A loan taken by the first defendant from the District Co-operative Bank, Thiruvananthapuram was outstanding and on the date of Ext.A1 agreement, a sum of Rs. 51,150/- was paid towards that loan for closing it. DW. 1 stated in evidence that item No. 1 of the plaint schedule was mortgaged to the bank. Intimation was given by the bank that proceedings would be initiated against

the first defendant. Item No. 3 was still outstanding on mortgage in favour of Kerala State Financial Enterprises, Vithura branch for a chitty loan, as evident from Ext.B4 certificate. The 2nd defendant was preparing for Phd. at Kerala University centre. Several loans were taken for his studies. Considering the nature and lie of the land, the nature and extent of the house and the nature of the improvements, it could be safely held, relying on the evidence on record, that the value of the plaint schedule properties at the time of execution of Ext.A1 was far above Rs. 7.5 lakhs. Ext.A13 was produced by the plaintiff to show that he purchased 17 cents of land near the plaint schedule properties for a consideration of Rs. 75,000/- on the next day on which Ext.A1 was executed. The case of the defendants is that Ext.A13 property was purchased for Rs. 40,000/- per cent of land. This document was produced to show that the value agreed upon between the parties for the present transaction was a proper value. The plaintiff stated in evidence that the plaint schedule properties have road frontage and are situate near K.P.S. Junction where several business activities go on. He also admitted that for the last twenty five years, the defendants are residing in the house in the plaint schedule properties. The plaintiff is a businessman. He owns a hollow bricks unit. He has a house of his own. His bank account shows that he was possessed of considerable cash. He could purchase Ext.A13 property on the next day of execution of Ext.A1.

20. There is another circumstance worth mentioning, that is, the plaintiff is not a signatory to Ext.A1 agreement. Dealing with such agreements where only one of the contracting parties put signature, one of us (Justice R. Bhaskaran) held in *Lalithambika v. Varghese*: : 2004(3)KLT892 thus:

Ext. A1 is executed by the defendant only. There is no agreement executed by the plaintiff. Therefore, if Ext.A1 is violated, the plaintiff alone can take action against the defendant. If the defendant takes any action it will be open to the plaintiff to pretend ignorance and contending that he has nothing to do with Ext.A1 and he was not aware of it. An agreement for sale is an agreement by two sides to perform the respective obligations and to have their rights enforced. In a case where one party alone signs the document, it is clear that the party who has not signed is at the dominating position. This circumstance itself is an indication to

show that it was obtained at the instance of the plaintiff to safeguard his interest while he did not put his signature in the document.

21. On the principles of law mentioned above and on the facts and circumstances emerging from the evidence on record, we are of the view that this is a fit case where the discretion should be exercised not to decree specific performance. It would be just, equitable and proper only to pass a decree for repayment of the amount paid by the plaintiff with reasonable interest.

In the result, we allow the Appeal and set aside the judgment and decree passed by the court below. The plaintiff is granted a decree for realization of Rs. One lakh with interest at 12% per annum from the date of suit till realization from the defendants. The plaint schedule properties shall be a charge for this amount. The parties shall bear their respective costs in this appeal. The plaintiff will be entitled for his costs in the suit.

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