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Court : Kerala

Decided On : Feb-11-1998

Reported in : AIR1998Ker253

Judge : S. Marimuthu, J.

Acts : [Specific Relief Act, 1963](#) - Sections 16(1)

Appeal No. : Second Appeal No. 741 of 1989

Appellant : Mathew

Respondent : Scaria and anr.

Advocate for Def. : T.M. Mohammed Yousuff and; James Mathew, Advs.

Advocate for Pet/Ap. : V.M. Kurian and; A.V. Thomas, Advs.

Disposition : Appeal dismissed

Judgement :

S. Marimuthu, J.

1. The plaintiff is the appellant. Defendants 1 and 2 are the respondents in this appeal. The appeal has arisen against the judgment delivered by the Subordinate Judge, Kottayam, in A.S. No. 188/85 dated 20-7-1988. The appellant-plaintiff filed the suit in O.S. No. 217/84 before the Court of the Munsiff, Palai on the following

grounds for the specific performance. Suit property measuring 3.5 cents originally belonged to the first defendant who is none other than his grandfather. The first defendant executed Ext. A1 agreement in his favour on 1-8-1984 agreeing to sell the property for a sum of Rs. 5000/- out of which on the date of Ext. A1 agreement he received Rs. 2500/- as advance. The first defendant instead of executing the sale deed in his favour attempted to sell the property to the second defendant. Therefore the plaintiff was constrained to file O.S. No. 217/84 before the same Court in which an interim injunction was granted against the first defendant and subsequently it ended in dismissal. The plaintiff issued notice to the first defendant requiring him to execute the sale deed as per the Ext. A1 agreement. On receipt of the notice the first defendant did not send any reply. Therefore the plaintiff filed the above suit for the purpose stated above. The suit was resisted by both the defendants by filing a written statement contending that the first defendant has not executed any agreement for sale such as Ext. A1 in favour of the plaintiff, nor did he receive any advance amount of Rs. 2500/-. The plaintiff being his grand son managed to get the original documents of the suit property from his wife who is examined as P.W. 2. The first defendant sold the suit property in favour of the second defendant on 15-10-1984 and the second defendant in pursuance of the sale deed executed by him is in possession of the suit property. Therefore the suit is liable to be dismissed. The second defendant who was latter on brought on record filed a written statement reiterating the contentions of the first defendant in the written statements. Before the trial Court no evidence either oral or documentary was let in on the side of the defendants. On the side of the plaintiff, he has given evidence as P.W. 1, the first defendant's-wife has given evidence as P.W. 2, and the scribe of Ext- A1 agreement has given, evidence as P.W. 3. In addition to the oral evidence Ext. A1 agreement and the prior title deed of the suit property Exts. A2 and A3 were marked. The trial Court on examining the evidence available on records on the side of the plaintiff decreed the suit for specific performance. Questioning the above judgment and decree of the trial Court the defendants 1 and 2 filed the above appeal A.S. No. 188/85 before the Subordinate Judge, Kottayam.

2. The Subordinate Judge on going through the evidence let in on both the sides as well as the judgment of the trial Court came to a conclusion that for Ext. A1 is

styled as a receipt, it is not an agreement and further Section 16(c) of the [Specific Relief Act, 1963](#) is not complied with by the plaintiff in the suit and therefore the suit is liable to be dismissed. Accordingly he allowed the appeal by reversing the judgment and decree of the trial Court. The points that were urged before me by both the learned counsel would be

1) Whether Ext. A1 is an agreement or a receipt.

2) Whether Section 16(c) of the Specific Relief Act is complied with by the plaintiff.

Points 1 and 2 :

3. No doubt as argued by the learned counsel for the respondents whether Ext. A1 is a receipt or it is an agreement is to be decided. Regarding the execution of the Ext. A1, no doubt, we have got the clear evidence of P.Ws. 1 to 3. P.W. 2 as pointed out above is none other than the wife of the first defendant and grandmother of the plaintiff. She speaks of the Ext. A1 and receipt of the advance amount of Rs. 2500/- by the first defendant on that particular date. So when I examined the argument of the learned counsel appearing for the respondents with reference to the Ext. A1, namely, whether it is an agreement or receipt along with findings recorded by the first appellate Court in para 9 of the judgment, I feel that the finding in para 9 of the judgment of the first appellate Court needs no interference in this regard. Therefore it can be held that there is an agreement between the parties concerned. The next point would be whether Section 16(c) of the Specific Relief Act is complied with. Section 16(c) reads as follows :

'Personal bars to relief-- Specific performance of a contract cannot be enforced in favour of a person;--

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.'

4. The learned counsel appearing for the respondents vehemently contended that when the ingredients of Section 16(c) of the Specific Relief Act do not find a place

in the pleading in a suit of this nature, that alone is sufficient to dismiss the suit. On the other hand, the learned counsel appearing for the appellant contended that a careful reading of the plaint averments would signify that the requirements under Section 16(c) of the Specific Relief Act have been complied with by the plaintiff. Requirement of Section 16(c) of the Specific Relief Act is a must in the pleading of the plaintiff as per the well settled principle of law as laid down by this Court as well as by the High Court of Karnataka in the following decisions :

- 1) 1974 Ker LT 115 : (AIR 1974 Ker 153) (Prabhakaran v. Bhavani)
- 2) AIR 1986 Kant 109 (Palthur Honnur Saheb v. Bopanna Annapurnamma)
- 3) 1987 Ker LJ 1102 : (AIR 1988 NOC 42) (Govindan Vishnu Namboodiri v. Ulahannan Mathan).

5. On the principles laid down in the above citations of this Court as well as that of Karnataka, when I look into the plaint, I have no hesitation to support the judgment of the first appellate Court that the Section 16(c) of the Specific Relief Act is not complied with by the plaintiff. Learned counsel appearing for the appellant further submitted that when no evidence either oral or documentary has been let in by the defendants to rebut the plaint averments the suit can be put to an end in favour of the plaintiff. That argument I cannot accept, because in a case of this nature, even though no evidence is let in by the defendant the plaintiff must establish the case in accordance with the provisions of Section 16(c) of the Specific Relief Act. Therefore, on account of the fact that no evidence is let in by the defendants, the plaintiff can(not) take advantage of it. In fact, the plaintiff himself has not stated in his evidence that he was willing and ready to perform his part of the contract and that has been specifically noted by the first appellate Court in para 11 of its judgment. However, as required by Section 16(c) of the Specific Relief Act the plaintiff has filed I.A. No. 4627/87 before the lower appellate Court to amend the plaint. Admittedly as argued by the learned counsel for the respondents that I.A. filed before the appellate Court to amend the plaint to incorporate the requirements of Section 16(c) of the Specific Relief Act was dismissed. The conduct of the plaintiff-appellant in filing that petition before the lower appellate Court further strengthens the case of the respondents. The next submission urged

by the learned counsel for the appellant would be that he issued a suit notice on 30-7-1984 to the first defendant stating that he is ready and willing to perform his part of the contract and the first defendant must come and perform his part of the contract on executing a sale deed in his favour as per the Ext. A1 agreement. However, on receipt of the notice no reply was sent by the first defendant. The plaintiff was also waiting in the sub-registrar's office on a particular date for the registration of the document. But the first defendant did not turn up. The above arguments of the learned counsel appearing for the appellant are not supported by any material on record. Because it is the duty of the plaintiff to establish that he has issued notice to the first defendant and the first defendant received notice or he refused to receive the notice. If really such a notice had been issued to the first defendant, the office copy of the notice could have been exhibited in the trial Court as well as the postal acknowledgment signed by the first defendant for the receipt of the notice also could have been marked in the trial Court. In this context it is a submission of the learned counsel appearing for the respondents that no such notice was issued by the plaintiff. When I examined the above submissions of the both learned counsel as I found earlier that no notice was issued by the plaintiff to the first defendant expressing his willingness and readiness for performing his part of the contract. On account of the foregoing reasons and the circumstances I have discussed in detail, I am of the view that there is no necessity to interfere with the finding recorded by the first appellate Court. The first appellate Court in its judgment directed the first defendant to pay a sum of Rs. 2500/- to the plaintiff with interest at the rate of 6 per cent per annum from 1-8-1989 till realisation together with the cost of the suit. Learned counsel appearing for the respondents submitted that his party is ready to pay the amount as directed by the first appellate Court. In case the amount is not paid so far by the first defendant shall pay that amount to the plaintiff as directed by the first appellate Court.

6. In the result, answering the points in favour of the defendants the second appeal stands dismissed confirming the judgment and decree of the lower appellate Court delivered in A.S. No. 188/85 dated 27th July, 1988. On account of the closer relationship of the parties I do direct the parties to bear their own costs.

