

K. Ramachandran Nair Vs. Leela Jose, Wife of Jose Varghese and ors.

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Court : Kerala

Decided On : Oct-23-2003

Reported in : AIR2004Ker219

Judge : A. Lekshmikutty, J.

Appeal No. : AS. No. 439 and 475 of 1997 (E)

Appellant : K. Ramachandran Nair

Respondent : Leela Jose, Wife of Jose Varghese and ors.

Advocate for Def. : R. Manoj, Adv.

Advocate for Pet/Ap. : G.S. Reghunath and; Mohan Jacob George, Advs.

Disposition : Appeal dismissed

Judgement :

A. Lekshmi Kutty, J.

1. These two appeals arise from the common judgment in O.S.Nos. 652 & 684 of 1989 on the file of the Principal Sub Court, Thiruvananthapuram. O.S.No.652/1989 was filed by the plaintiff for specific performance of the agreement of sale. The averments in the plaint was that the plaint schedule property originally belonged to late Sri M. Subbiah Pillai, father of the first defendant. Late Subbiah Pillai obtained title and possession over the property as per the decree and delivery list in O.S.No. 59/50 on the file of the Sub Court, Thiruvananthapuram. Subbiah Pillai passed away on 9-2-1983 and as per the registered Will No.18/1979 executed by him all his right, title and possession over the plaint schedule properties devolved on his three sons viz. S. Gopalakrishna Pillai, the first defendant and S. Bhagavathi Pillai. On 4-5-1988 they jointly executed an agreement of sale in favour of the plaintiff agreeing to sell the entire 20 cents for a total consideration of R. 2,50,000/-. The plaintiff paid advance of Rs. 61001/- towards the total consideration. The period of agreement was 15 months. In the said agreement it was stated that an extent of about 5 cents out of 20 cents is involved in O.S. NO. 506/83 on the file of the Munsiff's court, Thiruvananthapuram for recovery. While so, on 13-4-1989 Gopalakrishna Pillai and Bhagavathi Pillai executed sale deed NO. 1244/1989 in favour of the plaintiff regarding their 2/3 share in the entire 20 cents. The first defendant was not in station at that time and his whereabouts were not known. N. Gangadharan, a tenant of the building bearing T.C. 2/3255 in the plaint schedule property told the plaintiff that the first defendant had created certain document in favour of the 2nd defendant and her husband regarding a portion of 20 cents described in the plaint schedule. On further enquiry it was revealed that the first defendant had created false document styled as agreement of sale in favour of Sri Jose Varghese, husband of the 2nd defendant, who is the tenant of T.C. 2/3256 situated in the 20 cents property. The said Jose Varghese filed a suit O.S. No. 282/1988 before the Sub Court, Thiruvananthapuram and the first defendant had created sale deed in favour of the 2nd defendant regarding a portion of 20 cents. The plaintiff sent a registered notice through his Advocate on 5-7-1989 demanding

defendants 1 and 2 to cancel the said false and sham sale deed and execute a sale deed in favour of the plaintiff regarding 1/3 right of the first defendant in the 20 cents. To the said notice, the defendant sent reply raising totally false and baseless contentions. The sale deed created in the name of the 2nd defendant is a false and sham document unsupported by consideration. It is a collusive document created by the defendant to defeat and defraud the plaintiff. No title or interest passed on the 2nd defendant as per the sale deed. The sale deed was executed when the obligation to execute the sale deed in favour of the plaintiff was subsisting. It was created without the knowledge and consent of the plaintiff and the amount shown in the sale deed as consideration is false and fictitious. The defendants are therefore bound to execute the sale deed in favour of the plaintiff regarding the 1/3 share of the first defendant in the entire 20 cents of property and the plaintiff is entitled to get the sale deed executed regarding the said property on payment of balance sale consideration of Rs. 63,000/- due under the agreement of sale dated 4-5-1988 to the first defendant. The plaintiff was always ready and willing to take the sale deed regarding the plaint schedule property. Hence the suit is filed for specific performance of the agreement.

2. The first defendant remained ex parte. The 2nd defendant filed a written, statement contending that the suit is filed with a view to harass and vex the defendants as a counter blast against the suit filed by her for partition of the defendant's 1/3 right over the 20 cents of property obtained by her as per sale deed No.470/89 executed by the first defendant in her favour. The plaintiff was in occupation of the building situated in the entire 20 cents wherein the plaint schedule property is a part. All along he was trying to purchase the entire property from the first defendant and his brothers at a cheap rate taking advantage of his occupation. While so, the 2nd defendant's husband Jose Varghese, who was also a tenant under the first defendant and his brothers entered into an agreement for purchase of 1/3rd right of the first defendant. The first defendant executed agreement on 2-4-1987 in favour of the 2nd defendant agreeing to sell his 1/3 right and execute an agreement for sale in favour of the husband of the 2nd defendant or his nominee for a consideration of Rs. 20,000/per cent within a period of one year from the date of agreement and received Rs. 20,001/as part payment of sale consideration. The first defendant specifically agreed in the agreement that before execution of the sale deed, the entire 20 cents will be partitioned among the brothers and obtain separate possession and after disposal of the suit which was pending for recovery of possession, in respect of a portion of 20 cents. After the agreement, the first defendant received a further sum of Rs. 10800/- on various occasions as part payment of the sale consideration. The plaintiff was having his dishonest intention to purchase the entire property of 20 cents knowing fully well in respect of the agreement, in favour of the 2nd defendant's husband, was won over and he managed to refrain from executing a partition deed among the brothers. The 2nd defendant's husband was all along ready and willing to perform his part of the agreement on performance of the promise made by the first defendant in accordance with the agreement of sale dated 21-4-1987. He demanded the first defendant to execute the sale deed as promised by him on receipt of the balance sale consideration due to him. Then the first defendant approached the 2nd defendant's husband on 19-4-1988 for extension of time which he refused . Even though the 2nd defendant's husband issued registered notice to the first defendant demanding execution of the sale deed in accordance with the agreement, he did not do so. 2nd defendant's husband then came to know that the non-performance of the agreement by the first defendant was due to the instigation of the plaintiff and also to avoid the agreement. The plaintiff was making his earnest endeavour to obtain sale deed in respect of the plaint schedule property in his favour. Hence the 2nd defendant's husband as plaintiff filed O.S. No. 282/88 against the first defendant for specific performance and restraining the first defendant from executing any sale deed in respect the plaint schedule property to strangers. The first defendant after realising that there was no other way except to execute the sale deed entered into a compromise in O.S. No. 282/88 and a compromise petition was filed . Sale deed was executed in respect of the i/3rd right of the first defendant in favour of the 2nd defendant. The plaintiff is not entitled to any relief against the defendants. Agreement relied upon by the plaintiff is fabricated and brought into existence in collusion with the first respondent to avoid the agreement in favour of Jose Joseph. The agreement will not confer any right in favour of the plaintiff or make any obligation to the first respondent or his vendee. If the plaintiff had created any document, the same is not binding on the 2nd defendant. The first defendant never agreed to sell the plaint schedule

property to the plaintiff at any point of time and the plaintiff was aware of the existence of the agreement dated 21-4-1987 in favour of the 2nd defendant's husband.

3. The 2nd defendant as plaintiff filed O.S. No. 684/1989 for partition and separate possession of 1/3rd right over the plaint schedule property which is pending before the First Additional Sub Court, Thiruvananthapuram. The allegation that the plaintiff came to know the execution of the sale deed by the first defendant in favour of the 2nd defendant from one Gangadharan is false. The plaintiff was fully aware of the agreement in favour of Jose Varghese and the subsequent sale deed in favour of the 2nd defendant (plaintiff, in G.S.No. 684/1989). The 2nd defendant is a bona fide, purchaser for value without notice of any agreement alleged to have been entered into between the first defendant and the plaintiff. The plaintiff is not entitled to get any remedy against the 2nd defendant. The sale deed in favour of the 2nd defendant is valid and binding on all including the plaintiff. The claim that the period of agreement between the first defendant, and the husband of the 2nd defendant had expired is not correct. The obligation of the first defendant as per the agreement was subsisting and that the plaintiff was fully aware of the agreement and subsequent sale. Plaintiff is not entitled to get any relief. On the basis of the pleadings, the court below framed five issues.

4. O.S.No. 684/1989 is filed by the 2nd defendant as plaintiff against the plaintiff and others. The averments in the said plaint are similar to the contention raised in the O.S.No. 652/1989. The first defendant, who is the plaintiff in O.S.No. 652/1989, filed written statement similar to the averments in the plaint. Defendants 2 to 5 remained ex parte. The trial court raised two issues. Both the suits were jointly tried and evidence was recorded in O.S.No. 652/1989. The plaintiff in O.S.No. 652/1989 can be referred as the plaintiff and the plaintiff in O.S.No. 684/1989 can be referred as the 2nd defendant. On the side of the plaintiff, PW1 was examined and Exts. A1 to A16 were marked. On the side of the defendants, DW 1 to 4 were examined and Exts. B1 and B2 were marked. The court below after trial dismissed O.S.No. 652/1989 and passed a preliminary decree allowing partition and separate possession of 1/3rd share of the plaint schedule property to the plaintiff by metes and bounds. Against the said judgment and decree, these two appeals are filed.

5. The question to be considered is whether there is any reason to set aside the impugned judgment and decree.

6. Plaintiff filed In O.S.No. 652/1989 for specific performance of the contract entered into between the plaintiff and the first defendant and his brothers Gopalakrishnan Pillai and Bhagavathi Pillai as per Ext. A3 dated 4-5-1988 and in O.S.No. 684/1989 is filed by the 2nd defendant as plaintiff for partition and separate possession of 1/3rd right over the property. There is no dispute between the parties that the plaint schedule property originally belonged to Subbayya Pillai who got it as per the decree in O.S.No. 59/50 of the first Addi. Sub Court, Thiruvananthapuram. It is also the admitted fact that Subbaiah bequeathed the same to his three sons Gopaiakrishna Pillai, Bhagavathi Pillai and Madhavan Pillai. Subbaiah Pillai got delivery of the property through court in pursuance of the decree in O.S.No. 551/59. After the death of Subbaiah Pillai, the legatees under the will got right and possession over the property. The plaint schedule property is having an extent of 20 cents and each of them are entitled to 1/3rd share over the same. It is in evidence that while they were in possession and enjoyment of the property as co-owners, Madhavan Pillai entered into an agreement with Jose Varghese the husband of the 2nd defendant on 21-4-1987 agreeing to sell his 1/3rd right over the property to him or his nominees as per Ext.A6 at the rate of Rs. 20,000/- per cent and an amount of Rs. 20,001/- was paid as advance towards part of sale consideration. The term of performance of the contract was one year. It is the case of the plaintiff that Jose Varghese was not ready and willing to perform his part of the contract and he was having no sufficient funds to get the sale deed executed. So as per the terms of the agreement, Madhavan pillai forfeited the advance amount and Jose Varghese is not entitled to get the sale deed executed in his name or his nominee after the expiry of one year stipulated in the document. As per the plaintiff on 4-5-1988, the first defendant Madhavan Pillai and his brothers entered into Ext. A1 agreement, with the plaintiff agreeing to sell 20 cents of property to the plaintiff for a total consideration of Rs. 2,50,000/-. The period was 15 months from 4-5-1988. After Ext.A1, Madhavan Pillai was not in station and his whereabouts were not known. So Gopalakrishna Pillai and Bhagavathy Pillai jointly executed their 2/3 share over the

property as per Ext.A2 sale deed . Since the period of ' Ext. A6 was expired on 20-4-1988, the first defendant was fully competent to enter into an agreement with the plaintiff for sale of his 1/3rd share. It has come out in evidence that in the meantime husband of the 2nd defendant Jose Varghese filed O.S.No. 282/1988 against Madhavan Pillai before the Sub court for specific performance of Ext.A6 agreement. The said suit was subsequently compromised as per Ext.B2 and the first defendant executed Ext.A2 sale deed in favour of the 2nd defendant. Exts. A5, 7, 8 and 9 are respectively the certified copy of plaint, copy of the injunction petition, copy of the affidavit and written statement in O.S.NO. 282/1988. As per the plaintiff, Ext.B1 is a sham document and no consideration was passed. It is to be noted that Ext.B1 was executed before the compromise on 6-4-1989. So it is clear that Ext.B1 sale deed is a sham document without consideration.

7. Now let us consider whether Ext.A6 lapsed due to the expiry of one year time as contended by the plaintiff. Normally time is not the essence of the contract for sale of immovable property. The intention to treat time as the essence of the contract may be evidenced by circumstances which should be sufficiently strong to displace the normal presumption. Here in the instant case from the circumstances it cannot be found that time is the essence of the contract. As per Ext.A6 the first defendant agreed to execute the sale deed after disposal of the suit for recovery which was pending and also after effecting partition among the co-owners. Admittedly the partition was not effected among the brothers and the suit was also not disposed of even after one year. So it can be gathered that time is not the essence of the contract. Time can be made essence of the contract if the vendor gives such a notice to the vendee to perform his part of the contract within a specified period. The; plaintiff has not produced any evidence to that effect. So it is to be presumed that time is not the essence, of contract. Ext.A6 agreement is on 21-4-1987 whereas Ext.A1 is on 4-5-1988. If time is not the essence of the contract, then it cannot be stated that after the expiry of one year Ext.A6 became unenforceable.

8. Then the question is whether the plaintiff was aware of Ext.A6 agreement in favour of Jose Varghese. It is born out in evidence that Jose Varghese and the plaintiff were tenants of the shops in the plaint schedule property. As per the 2nd defendant, plaintiff was aware of Ext.A6 from the very inception and the allegation that he came to know about Ext.A6 and B1 from one Gangadharan, another tenant in the property is false. In Ext.A8 counter-affidavit filed by the first defendant in O.S.No. 282/1988 it is affirmed that the plaintiff herein was fully convinced that the agreement in favour of Jose Varghese was expired on 21-4-1988 and another agreement was executed in favour of the plaintiff. The said affirmation will not bind the plaintiff herein. But the fact remains that at the time of filing the counter affidavit in O.S. No. 282/1988 the first defendant has a definite contention that he has informed the plaintiff herein about Ext.A6 and he was fully convinced that the date is expired. It is to be noted that the contention was raised long prior to the institution of O.S.No. 652/1989. The circumstances shows that the plaintiff was aware of Ext. A6 agreement at the time of execution of Ext.A1. As per the version of PW1, he had talked with the first defendant and his brother about the sale of the plaint schedule property several times long prior to the execution of Ext.A1 and Ext.A1 was executed just four days after the expiry date of Ext.A6. So the contention of the plaintiff that he was not aware of Ext.A6 cannot be believed.

9. Admittedly Ext.A6 agreement is long prior to Ext.A1 agreement. When there is an agreement to sell the property in favour of a person prior to the agreement in respect of the same property, the plaintiff cannot claim any equity against the defendant and cannot enforce his agreement and the fact that the plaintiff had no knowledge of the prior agreement would not make any difference. The allegation in the plaint that he came to know about the agreement and sale from one Gangadharan also cannot be accepted, especially when he was not cited and examined to prove the same. If time is not the essence of the contract, Jose Varghese is entitled to get specific performance of the contract in his favour. So the plaintiff is not entitled to get specific performance on the basis of the subsequent contract.

10. It is argued on behalf of the plaintiff that there is no evidence to show that Jose Varghese was ready and willing to perform his part of the contract within the specified period and no notice was sent to the first defendant before the expiry of one year period specified in the agreement. But the contention of the 2nd

defendant is that Jose Varghese was ever ready and willing to perform his part of the contract. But the first defendant approached her husband asking for extension of time for execution of the sale deed which her husband refused. As per the terms of Ext.A6 before execution of the sale deed, the property is to be partitioned among the brothers and the suit which was pending should be closed. It is clear from the evidence that partition was not taken effect even at the time of filing Ext.A5 suit. The averments in the plaint shows that the plaintiff therein was always ready and willing to perform his part of the contract and still he was ready. It is true that the said allegation was denied by the first defendant in Ext.A8 counter affidavit and Ext.A9 written statement. During the pendency of Ext.A5 suit, the matter was compromised between the parties and the first defendant withdrawn all his Contention and executed Ext.B1 sale deed on 9-2-1988 in favour of the 2nd defendant, who is the wife and nominee of Jose Varghese for valid consideration before partition and closing of the pending suit. Jose Varghese was examined as DW2. He gave evidence in tune with the contention in the written statement of defendant No.2. Ext.A2 is the sale deed executed by Gopalakrishna Pillai and Bhagavathy Pillai in respect of their 2/3 share over the property on payment of the balance consideration due to them. As per the plaintiff, the first defendant was not in station and his whereabouts were not known at the time of execution of Ext.A2. So he could not join the sale deed. But the evidence shows that the first defendant has executed the sale deed in respect of his 1/3rd share over 20 cents in favour of the 2nd defendant. So the contention that first defendant's whereabouts were not known also cannot be believed. There is nothing on evidence to show that the first defendant was a mentally ill-person. Further the plaintiff is estopped from raising such a contention in the light of Ext.A1. In such circumstances the plaintiff is not entitled to get specific performance of Ext.A1 agreement and the 2nd defendant is not liable to execute the sale deed in his favour.

11. As per Ext.B1, the first defendant has executed a specific plot of 6.666 cents to the 2nd defendant. Unless the property is partitioned no specific plot can be conveyed to the vendee. So as per Ext.B1, the 2nd defendant will get only a joint right over the plaint schedule property. The allegation of the plaintiff that there is no consideration for Ext. B1 also cannot be accepted. The evidence of DWZ. Jose Varghese shows that the balance sale consideration was paid by him on behalf of his wife and the sale deed was got executed in her name. The recital in Ext. B1 would show that Rs. 20,000/- was paid as advance and Rs. 10,800/- was received by the first defendant on different occasions and the balance consideration was paid on the date of execution of Ext.B1. The source of money also has been sworn to by him. As per his evidence, he collected the funds from his business in electric goods and the chits amount which was deposited in the Muthoot Bank. Further he had filed O.S.No. 282/1988 for specific performance of Ext. A6 contract. In the written statement it is stated that he was ready to perform his part of the contract. He never denied the continuous readiness and willingness of the plaintiff therein and lack of funds to get the sale deed executed. But his contention was that since the property was not partitioned by executing a partition deed, he refused to take the sale deed. The evidence of DW3, the document writer would show that balance sale consideration was paid by DW2 to the first defendant and it was paid at his office. There is nothing to discard his evidence. So the allegation that Ext.B1 is executed without consideration cannot be accepted. The suit for specific performance was filed immediately after the expiry of the period, mentioned in Ext.A6. In such circumstances it cannot be found that the husband of the 2nd defendant was not having sufficient funds with him and he was not ready and willing to get the sale deed executed. The evidence of DW4, the advocate who was conducting the case for the first defendant gave evidence that Ext.A10 compromise petition was signed by him and the first defendant Madhavan Pillai. The circumstances would prove that Ext.A1 was got executed fully knowing the execution of Ext.A6. Hence the plaintiff is not entitled to get a decree for specific performance as claimed in O.S.No. 652/1989.

12. Since the 2nd defendant purchased 1/3rd share of the first defendant, she is entitled to get partition of her 1/3rd share over the plaint schedule property. So the 2nd defendant is entitled to get a decree for partition and separate possession as prayed for in O.S.No. 684/1989.

13. The learned counsel for the plaintiff further submitted that he had spent a huge sum for conducting

several litigations to protect the property. O.S.No. 506/1983 was filed against the trespassers. As defendant's vendor Madhavan Pillai did not join the suit, he was made a defendant in the said suit. So also the plaintiff was got impleaded in various litigations in respect of plaint schedule property as O.S.59/50, A.S.NO. 146/1994, E.A.770/1991, E. A. No. 297/1991 C.R. P. 62/1992, A. A. No. 453/1975, C.R.P. 1946/1991 etc. For conducting those cases and recovery of the plaint schedule property from the encroachers and litigants he had spent Rs. 2.5 lakhs. It is further stated that he had effected valuable improvements also in the property by constructing compound wall etc. spending more than Rs. 25,000/-. Since most of the abovesaid litigations terminated long after the filing of the written statement and tendering evidence, he could not include the said contentions in the written statement filed by him in O.S.No. 684/1988. In case partition is allowed, the plaintiff is entitled to recover the amount spent by him from the defendant. Hence the plaintiff may be allowed to amend the written statement to that effect.

14. The said amendment application is vehemently opposed by the 2nd defendant. The 2nd defendant has no case neither herself nor her vendor had spent any money for conducting the cases in respect of the properties. Some of the litigations were terminated after the filing of the written statement and tendering evidence also cannot be disputed. But the said application was filed long after the filing of the appeal on 7th February 2001. So the amendment application is allowed on payment of costs of Rs. 500/- to the counsel for the 2nd defendant within three weeks, failing which the petition shall stand dismissed. if; the cost is paid, the written statement can be amended and the plaintiff shall be given an opportunity to substantiate the contention raised in the amended written statement at the time of passing the final decree. With this observation, these Appeals are dismissed.

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