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(2018) 03 KL CK 0110

In the High Court Of Kerala

Case No : Regular First Appeal No. 300 Of 2008

K. George Babu APPELLANT

Vs

Varghese RESPONDENT

Date of Decision : 07-03-2018

Acts Referred:
Evidence Act, 1872 — Section 91, 92

Citation : (2018) 03 KL CK 0110

Hon'ble Judges : K.Abraham Mathew, J

Bench : Single Bench

Advocate : V.R. Kesava Kaimal, N.M. Madhu, K. Reghu Kottappuram

Final Decision : Dismissed

Judgement

1. These two appeals arise from the judgment and the decree in O.S.No.158 of 2006 on the file of Sub Court, Ernakulam. The appellant in R.F.A.No.529 of 2008 who was the defendant in the suit is the respondent in R.F.A.No.300 of 2008. The respondents in R.F.A 529 of 2008 who were the plaintiffs in the suit are the appellants in R.F.A No.300 of 2008. In this judgment the parties are referred to as plaintiffs and defendant.

2. The plaint schedule property having an extent of 45 cents is in the ownership and possession of the defendant. The adjoining property having an extent of 15 cents which is 'puramboke' also is in his possession. On 24.2.2005 he entered into an agreement with the plaintiffs for sale of the plaint schedule property and the adjoining 15 cents within six months and received from them Rs.2 lakhs towards the sale consideration. The application filed by the defendant for assignment of the 'puramboke' was under consideration of the government. The agreed price for the 'patta' land is Rs.2 lakhs per cent. Anticipating assignment the plaintiffs agreed to pay sale consideration for the 'puramboke' also at the same rate. The agreement provided that if the 'puramboke' was not assigned, the plaintiffs were not liable to pay any consideration for it. The government did not assign the 'puramboke' to the defendant. On 11.2.2006 the defendant sent a

notice to the plaintiffs alleging that the agreement was to pay 50% of the agreed price for the 'puramboke' in case the government did not assign the property to him. He informed the plaintiffs that he was ready to sell the property only with variation. This was not acceptable to the plaintiffs. They have been ready and willing to perform their part of the contract. On these allegations they prayed for a decree for specific performance and in the alternative for refund of the purchase price paid in advance with interest at 12% per annum. In his written statement the defendant raised the following contentions. The agreement between the parties was that in case the government did not assign the 'puramboke' to him, the defendant would pay consideration at the rate of Rs.1 lakh per cent for the 'puramboke'. But when they brought to him the written agreement it was noticed that the agreement provided that in case of nonassignment of the 'puramboke', the defendant would not pay any price for it. When he protested, the plaintiffs stated that notwithstanding the clause in the agreement, they would pay consideration for the 'puramboke' at Rs.1 lakh per cent in case of nonassignment. The defendant believed it. But when the government did not assign the property, they refused to pay any price for the 'puramboke'. He was not ready to sell the 'puramboke' without any consideration. The plaintiffs are not bona fide purchasers. They are business men in real estate. They were in search of potential buyers, but they could not find potential buyers. It is false that they have been ready and willing to perform their part of the contract. As undertaken by him, the defendant got the property measured, obtained encumbrance certificate and handed over their copies to the appellants. The defendant prayed for dismissal of the suit.

3. The trial court found that on the facts of the case the plaintiffs are not entitled to a decree for specific performance, but entitled to the refund of the purchase price paid in advance towards the sale consideration with interest at 12% per annum from the date of the agreement till realisation. The plaintiffs and the defendant challenge the decree to the extent it is adverse to them.

4. The following points arise for consideration.

i) Whether the lower court was justified in refusing to take into consideration the oral agreement pleaded by the defendant ?

ii) Whether the trial court was justified in refusing to grant a decree for specific performance ?

iii) Whether the trial court was justified in directing the defendant to refund the amount received by him (if any) in advance towards the sale consideration with interest at 12% per annum ?

5. Heard the learned counsel on both sides.

Point No.1:

6. The plaint schedule property, the extent of which is only 45 cents, is in the ownership of the defendant. The adjoining 15 cents which is 'puramboke' is in his

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possession. It is not disputed that on 24.2.2005 he entered into Ext A1 agreement with the plaintiffs for sale of the plaint schedule property as well as the 'puramboke'. The agreement shows that the defendant had applied for assignment of the 'puramboke' and the parties agreed that in case of assignment, the plaintiffs would pay Rs.2 lakhs per cent for the 'puramboke' also, which is the price agreed to be paid for the 'patta' land. The agreement further shows that in case of nonassignment the defendant agreed to sell the 'puramboke' without any consideration. On 11.2.2006 the defendant sent Ext A2 notice to the plaintiffs stating that the oral agreement was to pay Rs.1 lakh per cent for the 'puramboke' in case the government did not assign it. Though evidence was adduced with regard to the oral agreement, the learned Sub Judge refused to take notice of it in view of Section 92 of the Evidence Act. In fact, Section 92 of the Evidence Act prohibits admission of oral agreement for the purpose of varying a contract which has been proved in accordance with Section 91 of the Act. So the trial court should not have allowed the defendant to adduce evidence to prove the oral agreement pleaded by him. But the court rightly refused to take notice of it. The point is found against the defendant.

Point No.2

7. The period of agreement was six months from 24.2.2005. On 11.2.2006 the defendant issued Ext A2 notice informing him that Ext A1 agreement was not in conformity with the oral agreement and he was not willing to sell the property except with variation from the agreement in writing. He wanted the plaintiffs to pay consideration for the 'patta' land and the 'puramboke' at the rate mentioned in Ext A1 agreement. If that is not possible, he suggested, he would sell the 'patta' land excluding 15 cents on its western side and the 'puramboke'. The plaintiffs sent Ext A3 reply notice rejecting the suggestion. This proves that the defendant refused to sell the property in accordance with the terms in Ext A1 agreement. But that is no reason to hold that the plaintiffs are entitled to a decree for specific performance. They should prove that they have been ready and willing to perform their part of the contract notwithstanding the refusal of the defendant to sell it in accordance with the terms in the agreement.

8. The property was measured after the agreement was entered into. Ext B1 is the sketch prepared after the measurement. The total extent of 'patta' land was found to be 42 cents 228 squire links and 'puramboke' 16 cents 740 squire links. The price payable for the 'patta' land was Rs.2 lakhs per cent. If the 'puramboke had been assigned to the defendant, the plaintiffs would have been liable to pay Rs.2 lakhs per cent for the 'puramboke' also. The total price would have come to 58.968 x 2,00,000 = 1,17,93,600/- (Rupees one crore seventeen lakh ninety three thousand and six hundred only).

9. The defendant's allegation is that the plaintiffs were not bona fide purchasers and they were only real estate business men. Their intention was to find out potential purchasers after the agreement was entered into and to get sale deeds executed in the names of the potential purchasers. He would further say that the

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plaintiffs failed in this attempt.

10. It came out in the evidence of the first plaintiff, who was examined as PW1, that the second plaintiff was doing real estate business. PW1 was interested in it, which is evident from his admission that it was with his assistance the second plaintiff's son purchased 5 cents adjoining the plaint schedule property.

11. Had the plaintiffs' financial capacity to pay about Rs.1,17,00,000/- when they entered into agreement for sale. The admission of the first plaintiff (PW1) proves that he was only a photographer and his monthly income was Rs.3,500/- which was far below the income of a casual worker. There cannot be any dispute he did not have the capacity to purchase the plaint schedule property. The second plaintiff did not enter the witness box. There is no evidence to show that he had the capacity to pay the sale consideration or a substantial portion of it. Thus, there is a total lack of evidence to prove that the plaintiffs had the capacity to pay the sale consideration. It is crystal clear that they were not bona fide purchasers and they entered into the agreement as part of their real estate business. Unless they could have found out some potential purchasers they could not have purchased it. There is not even a suggestion in the evidence of PW1 that the plaintiffs could find out some purchasers for the property.

12. The agreement was entered into on 24.2.2005. The period of agreement was 6 months. So the transaction should have been completed by 24.8.05. It came out in the cross-examination of PW1 that he or the second plaintiff did not inform the defendant before 28.2.2006 that they were ready to purchase the property paying the balance sale consideration. He had no explanation for not doing so. The allegation of the plaintiffs that they have been ready and willing to perform their part of the contract appears to be false. The learned Sub Judge rightly held so. The point is found against the plaintiffs.

Point No.3:

13. It is an admitted fact that on the date of the agreement the defendant received from the plaintiffs Rs.2 lakhs towards the sale consideration. The trial court has ordered to him refund the amount with interest at 12% per annum from the date of the agreement. The plaintiff would say that he sustained loss because of the breach committed by the plaintiffs and he is not liable to refund the money. There is no evidence to support his case that he sustained loss because of the non performance by the plaintiffs. That apart, he refused to perform his part of the agreement without variation. Further in his Ext A2 notice sent to the plaintiffs he expressed his readiness to refund the amount received by him with interest at reasonable rate. So in my view the trial court rightly directed him to pay back the amount. The rate of interest fixed by the trial court is 12% per annum. This is not reasonable. It is fixed at 6% per annum and interest is payable from the date of the suit. The point is found partly in favour of the plaintiffs.

In the result, RFA No.300 of 2008 is dismissed. RFA 529 of 2008 is allowed in

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part. The decree passed by the trial court is modified in as much as the plaintiffs are entitled to interest only at 6% per annum and from the date of suit only.

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