

(2012) 09 KL CK 0150

In the High Court Of Kerala

Case No : Regular Second Appeal . No. 1077 of 2012

Marykutty John, Thamarappallil, from Valethu, Kuttamperoor
Muri, Mannar Village

APPELLANT

Vs

Mariyamma George, Kizhakke Nedungattil, Budhanoor (East),
Ennakkadu Village - 689624 and Yohannan John V. John,
Thamrappallil, From Valethu, Kuttamperoor Muri, Mannar
Village - 689622

RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Citation : (2012) 09 KL CK 0150

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Rinny Stephen Chamaparambil and Smt. Asha Elizabeth Mathew, for
the Appellant;

Final Decision : Dismissed

Judgement

Justice Thomas P. Joseph

1. The appellant is the 2nd defendant in O.S. No. 50 of 2002 of the Sub Court, Mavelikkara, aggrieved by the decree for refund of advance money, confirmed by the I Additional District Court, Mavelikkara in A.S. No. 64 of 2008. As per Ext. A1, agreement dated 14.08.2000 the 1st respondent/plaintiff agreed to purchase the property belonging to the appellant and the 2nd respondent/1st defendant. The sale consideration stated in Ext. A1 is Rs. 14 lakhs. It is not disputed that at the time of the agreement, appellant and the 2nd respondent received Rupees one lakh by way of advance from the 1st respondent. The sale deed was to be executed by the month of October, 2000. The 1st respondent filed suit for recovery of advance money claiming that she was ready and willing to perform

her part of the contract but the appellant and the 2nd respondent were not ready. She expressed her willingness to deduct the loss if any suffered by the appellant and the 2nd respondent on account of non execution of the sale deed.

2. The appellant and 2nd respondent contended that they were ready and willing to perform their part of the contract but the 1st respondent backed out. They also contended that as per terms and conditions of Ext. A1, amount received by the appellant and the 1st respondent stands forfeited on account of breach of contract by the 1st respondent. A further contention they raised is that since the 1st respondent was not ready and willing to purchase the property, appellant and the 2nd respondent were constrained to sell the property to discharge liability of the 1st respondent for a lesser price, thereby suffered loss and that amount is to be adjusted in the amount payable to the 1st respondent.

3. The trial court negatived the plea of the appellant and the 2nd respondent and decreed the suit for recovery of advance money with interest.

That judgment and decree are confirmed by the first appellate court. Hence the Second Appeal.

4. The learned counsel for the appellant contended that even in the plaint it is admitted that appellant and the 1st respondent have suffered loss due to the non-performance of the contract. According to the learned counsel, there is no evidence to show that the 1st respondent was ready and willing to perform her part of the contract. It is also stated that evidence is sufficient to show that breach was on the part of the 1st respondent.

Hence, in view of the terms of Ext. A1, the amount is liable to be forfeited. In that view of the matter, it is argued that judgment and decree of the courts below cannot be sustained.

5. I am given a copy of Ext. A1, agreement which I have perused. The agreement is executed between the 1st respondent on the one side and the appellant and the 2nd respondent on the other, the former agreeing to purchase property of the appellant and the 2nd respondent for Rs. 14 lakhs.

It is stated in Ext. A1 and it is not disputed also that the appellant and the 2nd respondent received Rupees one lakh by way of advance. True, it is stated in Ext. A1 that if there is any breach on the part of the 1st respondent, she will not get back the advance money.

6. So far as advance money is concerned, it is part of the sale consideration and notwithstanding as to who is at breach, the purchaser is entitled to get back the said amount unless breach was on the part of the purchaser and there is a stipulation for forfeiture in the agreement and it is reasonable. If the purchaser is at fault, it is open to the vendor to adjust the loss if any, suffered by him in the advance money. So far as earnest money is concerned, it becomes part of the sale consideration only when the document is executed. The earnest money is a deposit made as security for due performance of the contract and if the purchaser is at fault, the earnest money will stand forfeited in accordance with the terms and conditions of the contract.

7. In the present case, a reading of Ext. A1 shows that the sum of Rupees one lakh was received by the appellant and the 2nd respondent as advance money. May be, if the 1st respondent was at fault, appellant and the 2nd respondent were entitled to forfeit the amount as per terms of Ext. A1.

8. On the question as to who was at breach is concerned, I do not find any admission in the plaint that the 1st respondent was at fault. She only stated that if at all it is found that the appellant and the 2nd respondent suffered loss, such loss may be adjusted in the amount due to her. That is what she has stated as PW1 as well. It is not as if she has admitted that she was at fault or that the appellant and the 2nd respondent suffered loss.

9. The 1st respondent in her evidence as PW1 stated that she was ready and willing to perform the contract within the time stipulated by Ext. A1.

Departing from the earlier decisions, the Supreme Court has held that so far as sale of immovable property is concerned, it is possible to treat time

as essence of the contract taking into account the soaring price of property. The 1st respondent has stated that within the time stipulated in Ext.

A1, she had been to the office of the Sub Registrar and even attested documents executed there. True, those documents are not produced in the case.

10. So far as the appellant and 2nd respondent are concerned, of course they pleaded that they were ready and willing to perform the contract.

Appellant stated so as DW1 It has come in evidence that during the time stipulated in Ext. A1, the 2nd respondent had gone abroad. The junction

of the 2nd respondent was necessary to execute the sale deed. True, the appellant and the 2nd respondent produced Ext. B1 which is the certified copy of a power of attorney executed by the 2nd respondent in favour of the appellant. That power of attorney is dated 05.10.2000. There is no evidence to show that the fact of the appellant being authorised by the 2nd respondent to execute the sale deed on his behalf was conveyed to the 1st respondent.

11. A further fact I must notice is that between the parties there was no demand in writing to execute the sale deed and pay the balance sale consideration. Therefore, the question has to be decided on the basis of oral evidence parties have let in.

12. As per a complaint preferred by the 1st respondent to the local Circle Inspector, he had summoned the parties and there was a direction to the appellant and the 2nd respondent to return the advance money. This is admitted by the appellant when examined as DW1.

13. The courts below held that the appellant and the 2nd respondent were not able to show that the breach was on the part of the 1st respondent.

This is a case where, invoking forfeiture clause in Ext. A1, the appellant and the 2nd respondent wanted to non-suit the 1st respondent. Burden was therefore, on them to show that the 1st respondent was at fault. They failed in proving default on the part of the 1st respondent.

14. So far as loss allegedly suffered by the appellant and the 2nd respondent is concerned, they have produced Ext. B2, sale agreement dated

19.08.2000 but, that sale agreement is between the 2nd respondent and his brother. That has no direct bearing on Ext. A1 as to who was at fault

or whether the appellant and 2nd respondent suffered loss. The claim for damages is based on the sale of the very same property to another

person for a price lessor than Rs. 14 lakhs agreed in Ext. A1. So far as that claim is concerned, though it is claimed by the appellant when

examined as DW1 that an agreement was executed, that agreement is not before the court. Nor is the sale deed executed by the appellant and the

2nd respondent before court.

15. It is submitted by the learned counsel that the sale consideration referred to in the said agreement is Rs. 11 lakhs, i.e. Rupees three lakhs short

of the sale consideration agreed in Ext. A1. I stated that the said agreement is

not before the court. Therefore, there is no evidence to hold that the appellant and the 2nd respondent suffered loss. At any rate, since it is not shown that the 1st respondent was at fault and since Ext. A1 shows that the sum of Rupees one lakhs was received by the appellant and the 2nd respondent by way of advance, 1st respondent is entitled to get back the advance money. In the view of the above, I do not find any substantial question of law involved in the Second Appeal requiring admission.

The Second Appeal is dismissed.

All pending interlocutory applications will stand dismissed.