
(1989) 11 KL CK 0044

In the High Court Of Kerala

Case No : A.S. No. 183 of 1981 and Memorandum of Cross Appeal

Mathew

APPELLANT

Vs

M.C. Lakshmanan

RESPONDENT

Date of Decision : 06-11-1989

Acts Referred:

Evidence Act, 1872 — Section 91, 92

Citation : (1989) 11 KL CK 0044

Hon'ble Judges : Sivaraman Nair, J;Shamsuddin, J

Bench : Division Bench

Advocate : S. Easwara Iyer and E. Subramoni, for the Appellant; M.N. Sukumaran Nayar and B. Raman Pillai, for the Respondent

Final Decision : Allowed

Judgement

Sivaraman Nair, J.—The Defendant in O.S. No. 173 of 1973 before the additional Sub Judge, Alleppey is the Appellant. Respondent was the Plaintiff. Trial court decreed the suit, directing the Appellant-Defendant to execute sale deed in respect of the plaint property in favour of the Plaintiff on receipt of the balance sale consideration recited in Ext. A-1 within one month in performance of Ext. A-1 agreement for sale. In case the Defendant did not execute the sale deed as directed, the Plaintiff was to deposit the balance of consideration in Court and give notice of deposit to the Plaintiff and the Plaintiff was entitled to have the sale executed through court in his favour in specific performance of Ext. A-1 and that from the date of deposit of the balance of sale consideration in court till recovery of the plaint property, the Plaintiff was allowed to realise mesne profits at the rate of Rs. 2,400 per annum.

2. Plaintiff-Respondent filed the suit for specific performance of Ext. A-1 agreement for sale which was entered into on 29th March 1978. It related to the sale of plaint schedule property for a consideration of Rs. 15,112 within six months of the date of agreement. An amount of Rs. 3,000 was paid as advance consideration and part of the plaint schedule property consisting of a thatched

shed was delivered over to the Plaintiff. A shop room in the ground floor of the building was leased to one P.P George. Defendant-Appellant was occupying the first floor. According to Ext. A-1 agreement, the Defendant was to evict the tenant and give vacant possession of the entire building to the Plaintiff within the stipulated period. He had also agreed to put up a compound wall to separate the plaintiff property from its adjoining property. Plaintiff was willing to perform his part of the contract and requested the Defendant to execute the sale-deed. Defendant filed an application under the Kerala Buildings (Lease and Rent Control) Act to evict the tenant of the shop room. But the same was dismissed. Plaintiff sent Ext. A-2 notice on 20th September 1978 expressing his willingness and readiness to perform his part of the contract and requested the Defendant to be present in the Sub Registrar's Office, Alleppey on 29th September 1978 to execute the sale deed. The Defendant refused to accept that notice. Though the Plaintiff was present at the Registry Office from 10.00 am. to 3.00 p.m. on that day, the Defendant did not appear. He did not execute the sale deed. Notwithstanding his breach of Ext. A-1, Defendant is bound by the terms of the contract to execute the sale deed. Ext. A-1 agreement itself provided that if the Defendant was not able to evict the tenant from the shop room within the specified period, he would nevertheless execute the sale deed. Ext. A-1 agreement itself provided that such eviction at the expense of the Defendant-Plaintiff also claimed that if specific performance would not be ordered for any reason, he may claim in the alternative, the advance amount paid and a further amount of Rs. 2,500 as compensation for breach of contract from the Defendant.

3. Defendant-Appellant contended that the Plaintiff did not pay him the advance of Rs. 3,000 and consequently he did not put the Plaintiff in possession of the thatched building as per the terms of Ext. A-1 agreement. It was his case therefore that the Plaintiff himself having committed breach of Ext. A-1 contract, was not entitled to seek specific performance of the same. He denied any knowledge of the Plaintiff having gone to the Sub Registry Office on 28th September 1978. He submitted that the Plaintiff was not entitled to get the sale deed executed in his favour; nor was he entitled to any compensation for breach of contract in the alternative.

4. The trial court raised issues relating to maintainability of the suit and as to who committed breach of Ext. A-1 contract. Separate issues were framed as to whether the Defendant-Appellant received the amount of Rs. 3,000 as recited in Ext. A-1, and whether the Plaintiff had obtained possession of the thatched shed consequent thereon. Other issues related to the readiness and willingness of the Plaintiff to perform his part of the contract and his entitlement to enforce Ext. A-1. Yet another issue related to mesne profits from the plaintiff property.

5. The trial court found the suit to be maintainable. It also found on evidence of P. Ws. 1 to 3, that Plaintiff had paid advance amount of Rs. 3,000. Again on evidence of P.W. 1, the trial court found that the Defendant had put the Plaintiff in possession of the thatched shed on receipt of the advance of Rs. 3,000 as per

the recitals contained in Ext. A-1. Trial court relied on Sections 91 and 92 of the Evidence Act 1.0 hold that the Defendant would not have been permitted to lead oral evidence against the express terms of Ext. A-1 contract. However, since both sides had adduced evidence relating to payment of advance and transfer of possession of the thatched shed, trial court examined such evidence and found in favour of the Plaintiff. P. Ws. 2 and 3 are the scribe and attestor of Ext- A-1. Trial court accepted their version relating to payment of advance.

6. On the question of payment of advance and transfer of possession of thatched shed as a consequence thereof, the defence evidence consisted of the oral testimony of D.W. 1, the Defendant, D.W. 2 a neighbour and the brother of his tenant-George and Defendant's nephew D.W. 3. Trial court decided to prefer the evidence of P.W. 1 against D.W. 1 for the reason that the former was a man of means and the latter, to quote the trial court, was "on his own showing the Defendant is not a man of such status. He has no employment now." Trial court also noticed that he was unemployed at the time of his examination even though he was employed as a salesman in a textile shop formerly, and observed that it was difficult to believe that he relinquished his employment for no reason. The lower court took note of the suggestion, that he was dismissed from employment for theft of textile though that suggestion was denied unequivocally. The court also found that the Defendant had not satisfactorily explained the recital in Ext. A-1 about receipt of Rs. 3,000 as advance, if actually no such amount was paid. The court also refused to consider the plea of the Defendant that since advance was not paid, he did not put the Plaintiff in possession of the thatched shed. It observed that the assertion relating to non-payment of advance and consequent non-delivery of possession of the shed could not be true in the face of the express recitals in Ext. A-1. It found further that the Defendant not having sent a notice to the Plaintiff indicating that since the advance was not paid as per Ext. A-1, he was not bound to execute the sale deed; his evidence could not be believed. His conduct in never calling upon the Plaintiff to pay the advance and his refusal to receive Ext. A-2 notice were also taken note of as circumstances indicating that the Defendant was not a reliable person. D.Ws. 2 and 3 were examined to prove that the Defendant was in possession of the shed, possession of which was alleged to have been transferred simultaneously with execution of Ext. A-1 and receipt of advance thereunder. The court made short work of these two witnesses by stating that the evidence of D.W. 2 that the Defendant was attending to the thatching of the shed could not be true because he had no direct knowledge and he gathered that information only from the Defendant. The entire testimony of D.W. 3 was excluded because he was the son of the Defendant's brother.

7. It appears to us, on a reading of Ext. A-1, that payment of Rs. 3,000 as advance towards consideration and the consequent delivery of possession of the thatched shed which was part of the property agreed to be transferred were only recitals of fact and not terms of the contract. They were to be performed simultaneously. If the advance was not paid, there was a failure of consideration

and the Defendant would have been justified in refusing to deliver the thatched shed, which formed part of the property agreed to be transferred. Conversely, it is only reasonable to find that if the Defendant had not parted with and handed over possession of the thatched shed, the Plaintiff would not have paid the advance. We are of the opinion that these two are so integrally interrelated that either could not have been treated in isolation. We also find that they relate to contemporaneous conduct of the parties to Ext. A-1 agreement.

8. The Appellant urges that the trial court erred in law in rejecting the defence evidence on this important aspect of the case for the only reason that the Defendant was not a man of much status, that he was not in employment and that his case that he relinquished his job without any reason, could not be believed. He also submits that the other circumstance that he did not send notice requiring the Plaintiff to pay the amount of Rs. 3,000 as advance as per Ext. A-1 and his refusal to receive Ext. A-2 notice would be circumstances justifying a finding that he was an unreliable person, without any sense of truth or desire for adhering to principles is totally unfounded. Counsel submitted that the trial court erred in treating the payment of advance by the Plaintiff and handing over possession of the shed as independent and unrelated factors. He pleaded forcefully that the court acted improperly in volunteering an assumption in favour of the Plaintiff that the Defendant had handed over possession of the shed at the time of Ext. A-1 agreement, that it was in the possession of the Plaintiff for some time and the Defendant thereafter dispossessed the Plaintiff by use of force. He also submitted that the observations contained in the judgment that Sections 91 and 92 of the Evidence Act precluded oral evidence of the nature attempted by defence was an obvious error of law, since he was entitled to lead evidence relating to failure of consideration and breach of terms of the contract.

9. The point of law which we have to consider first is whether the trial court was justified in its assumption that the Defendant was precluded by the provisions of Sections 91 and 92 of the Evidence Act from leading oral evidence to the effect that the Plaintiff had not paid the advance of Rs. 3,000 and the Defendant had not put the Plaintiff in possession as a consequence thereof of the thatched shed, which formed part of the plaint property.

10. Section 91 of the Evidence Act provides, that no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Section 92 provides for exclusion of evidence of oral agreement and is to the effect:

When the terms of any such contract, grant or other disposition of property or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives-in-interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

The first proviso, on which counsel for the Appellant relies, is in the following terms:

Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

11. It is the case of the Appellant that this proviso applies to the facts of the present case and therefore it was competent for the Defendant-Appellant to adduce evidence relating to failure or non-payment of consideration and non-delivery of possession of a part of the suit property as a result thereof. Alternatively, if the Defendant was seeking to prove by oral evidence, that certain recitals of fact in Ext. A-1 agreement were not true, such oral evidence may not be barred. That which is excluded by Sections 91 and 92 is only oral evidence of the terms of the document under the former or such evidence for contradicting, varying, adding to or subtracting from such terms in the latter.

12. An agreement made without consideration, except on account of natural love and affection, or as a promise for compensation for something done or a promise to pay a debt barred by the law of limitation, being void, want or failure of consideration is a matter which may be proved by oral evidence notwithstanding the recitals in the contract. A catena of decisions-Sah Lalchand v. Inderjit ILR All 370 (P.C.), Mohammad Taki Khan Vs. Jang Singh, , Radhamohan Thakur and Others Vs. Bipin Behari Mitra and Another, , Baldeo Singh and Others Vs. Dwarika Singh and Others, , Thomman v. Taluk Land Board 1976 KLT 840, Kunhammed Kutty v. Avokker 1984 KLT 716 etc. have kept the nice but real distinction between the terms of the contract and recital of fact therein. The courts have always held, that consideration for the contract not being a term of the contract, it is open to the vendor to lead oral evidence to the effect that no consideration or only part thereof was actually received, notwithstanding recitals in the contract. It will therefore be competent to a party to a contract to adduce evidence to prove want or failure of consideration. Want or failure of consideration invalidates the document, so that the terms of the above proviso automatically applies. The assumption of the trial court that Sections 91 and 92 of the Evidence Act operated to exclude oral evidence in support of the specific plea of the Defendant-Appellant, that the advance, recited in Ext. A-1 document, was not paid, is therefore clearly faulty.

13. On a reading of Ext. A-1 document, we find that payment of advance consideration and delivery of a part of the suit-property were so closely inter-linked that one cannot be separated from the other. The specific plea of the Defendant was that the Plaintiff did not pay the advance and therefore he did not deliver the thatched shed as per the contract. Both these facts being so closely inter-linked, it was open to the Defendant-Appellant to let in oral evidence in respect of these inter-linked transactions. We are of the opinion, that none of the provisions in Sections 91 and 92 of the Evidence Act operated as a bar against

the acceptance of oral evidence relating to the twin transactions.

14. Counsel for the Respondent submitted that in addition to the recitals contained in Ext. A-1, the evidence of P.W. 1, the scribe, P.W. 2, and the attesor P.W. 3, amply proved that the amount of Rs. 3,000 was actually paid. Neither P.W. 2 nor P.W. 3 spoke anything about delivery of possession of the thatched shed. Plaintiff rested his case entirely on the recitals of Ext. A-1 and his assertion in that regard. The trial court preferred to accept that evidence for the reason that P.W. 1 was a man of means doing business in letting out furniture etc., and to raise Rs. 3,000 as advance consideration was not difficult for him. On a reading of the evidence as a whole, we are inclined to hold that the Appellant is right in his submission that the trial court did not read the whole of his evidence and wrongly ignored the effect of the cross-examination. His statement in cross-examination was that his monthly turn-over was Rs. 10,000 and he could save Rs. 3,000 out of that, that his investment in the business was between Rs. 20,000 and Rs. 30,000, that he was never an Assessee under the Income Tax Act, and that he had not produced any account to show that he had sufficient funds available on the date of Ext. A-1 to pay the advance of Rs. 3,000. He produced Ext. A-5 Savings Bank Deposit Pass Book to prove that he had sufficient funds. The first entry in that account was in May 09, 1978. Till the end of June 1978, the balance amount available in that account was only Rs. 3,555. He asserted that he was maintaining accounts for all his income and expenditure, but stated that those accounts would not show any entry relating to the payment of Rs. 3,000 on the date of Ext. A-1. In re-examination, he stated that the accounts which he mentioned related only to his business transactions. We are of the opinion, that the trial court erred in relying entirely on a part of the oral evidence of P.W. 1 for finding on issues 2 and 4 in his favour.

15. On the question of delivery of possession of the thatched shed, on the date of Ext. A-1, the Plaintiff was equally equivocal. It was his case that the Defendant delivered possession of the shed to him after receipt of the advance of Rs. 3,000 and that he was using the thatched shed as a warehouse for the furniture which he used to let out to customers. But he admitted, that expenses on that count would not be evident from his accounts. It was his case that he was not using the thatched shed, because he had obtained another store room about 3 months prior to his examination. He asserted that the thatched shed was still in his possession and was locked by him using the lock and key which the Defendant handed over to him when he delivered possession of the shed as per Ext. A-1 agreement. He was asked whether any of his articles would be found in the thatched shed if a Commissioner was deputed from court; his answer was in the negative. To a further question, whether it may be possible for a Commissioner to open the thatched shed with the key in his possession, he asserted that he had the key with which the shed could be opened. He had filed an injunction petition, I.A. No. 1673 of 1980, seeking to restrain the Defendant from continuing in possession of the property. Significantly he did not mention anything about the thatched shed in the affidavit accompanying the application.

There is a more significant admission that he filed the injunction application only after the Defendant-Appellant filed an application for issue of a Commission to ascertain as to who was in possession of the shed. The trial court glossed over this significant portion of his evidence in cross-examination. It, however, volunteered a finding in favour of the Plaintiff, that possession of the thatched shed must have been delivered to him according to the terms of Ext. A-1, that he continued in possession for some time and thereafter the Defendant forcibly dispossessed him and reduced the shed to his possession. It was not the case of the Plaintiff. There was absolutely no evidence in that regard. Not even a single question was put to the Defendant when he was examined as D.W. 1 suggesting that he forcibly dispossessed the Plaintiff of the thatched shed, of which the Plaintiff was in possession pursuant to Ext. A-1 agreement.

16. We are also of the opinion that the manner in which the trial court dealt with the defence evidence was perfunctory and perverse. D.W. 2 had not seen the Defendant thatching the shed. He had knowledge only from what the Defendant told him. But he was the brother of the Defendant's tenant, George, whom the Defendant sought to evict filing a petition under the Rent Control Act. D.W- 3 was of course, the nephew of the Defendant. But he was also his immediate neighbour. We are of the opinion that the defence evidence deserved closer examination and better consideration than it received from the trial court. The Plaintiff could not make out his definite case that he had thatched the shed. He could not prove his possession of the shed at any time. In fact, he did not even attempt to do that. The trial court disbelieved his claim for possession. It was in spite of all these facts, that the trial court volunteered assumptions, in favour of the Plaintiff and entered findings on issues 2 to 4. We are of the opinion that there should be more and better evidence in respect of these crucial aspects.

17. We see force in the submission of the Appellant s counsel, that the only finding which the trial court could have entered on the basis of the evidence before it was that the Defendant had not as a matter of fact, delivered possession of the thatched shed pursuant to Ext. A-1 agreement and the Plaintiff at no time obtained possession of that shed. If possession of the shed was not handed over to the Plaintiff as recited in Ext. A-1, it is quite possible that it was because the Plaintiff had not paid the advance amount of Rs. 3,000. In the light of the recitals contained in Ext. A-1, we are inclined to hold that these two transactions were so closely interlinked that one could not be sustained without the other. If the Plaintiff had paid the advance, the Defendant would have simultaneously delivered possession of the shed- The finding of the trial court is definitely to the effect that the Plaintiff was not in possession of the thatched shed when he was examined. The Plaintiff never suggested that he lost possession due to forcible entry by the Defendant. Nor was there any evidence that he sought restoration of lost possession. That probabilises the case of the Defendant that he did not part with any portion of the property because of failure or want of consideration as per recitals contained in Ext. A-1. We are, however, not in a position to decide this question one way or the other due to dearth of

any better and more clinching evidence in this regard. This aspect is very material, since on a finding on this aspect, depends the question whether and if so who committed breach of the contract.

18.P.Ws. 2 and 3 are witnesses to the execution of Ext. A-1. They also speak about the payment of Rs. 3,000 as advance in terms of Ext. A-1 soon after the execution of Ext. A-1. Testimony of these witnesses was not shaken in cross-examination. The trial court has stated that these witnesses impressed him as witnesses of truth. He, therefore, believed their evidence regarding payment of the amount of Rs. 3,000 as per Ext. A-1 agreement.

19. One other circumstance on which the trial court relied for finding that the advance was paid is that soon after Ext. A-1, the Defendant filed R.C.P. No. 60 of 1979. The Rent Control Court dismissed that application on a finding that the ground on which the Appellant claimed eviction, viz., that he bona fide required the shop for his own use could not be believed in view of the fact that he had already entered into an agreement for sale of the building and had received advance for such sale.

20. The oral evidence of P.Ws. 2 and 3 about payment of advance as per recitals in Ext. A-1 has to be examined in the light of the definite case of the Defendant that he had not delivered over possession of the thatched shed as stated in Ext. A-1 agreement since the advance amount of Rs. 3,000 was not paid. The trial court had found that the Plaintiff was not in possession of the shed. We have referred to the finding which the trial court volunteered in favour of the Plaintiff that the Defendant would have put him in possession of the shed at the time of Ext. A-1 agreement and the former would have dispossessed the Plaintiff by force subsequently. We have held that the trial court erred in that finding, because there was absolutely no plea or proof in support of that. We are of the opinion that it is not safe to sustain the finding which is based only on conjectures. The payment of advance¹ and delivery of possession of the thatched shed are so inextricably inter-linked that one cannot stand without the other. It is in this context that we have to examine the oral evidence of P. Ws. 2 and 3 with reference to Ext. A-1. If the Plaintiff had actually paid the advance and he was not actually put in possession of the shed in terms of Ext. A-1, the Plaintiff would naturally have made some attempts to get possession of the shed. There is no evidence that he made any such attempt. This conduct of the Plaintiff seems to us to be curious. We are of the opinion that the evidence on the whole is not sufficient to sustain the finding that the Plaintiff had performed his part of the contract and was entitled to a decree directing the Defendant-Appellant for specific performance of his part of the obligation.

21. It is true that the trial court had the benefit of watching the demeanour of witnesses. It is also true that the ordinary inferences of credibility of witnesses as drawn from their demeanour should not be lightly interfered with by the appellate court. In the present case, however, the question is not one of credibility depending on demeanour of witnesses but of drawing inference from

proved facts. The incontrovertible fact is that the Plaintiff could not make out his case that possession of the shed was delivered to him at the time of Ext. A-1 and that he continued in such possession even on the date of his examination. As a matter of fact, the trial court disbelieved him in that regard. If he was not able to make out his essential element of the transaction, which was closely and inextricably inter-related to the passing of consideration, the trial Court should not have decreed the suit as it did.

22. At the same time, we do not think it proper for us as an appellate Court to supplement the evidence by inferences, different from those of the trial Court. Inferences reasonably drawn from proved facts may serve as effective reasons. That does not mean that assumptions can be substituted for evidence or that conjectures can do duty for proof.

23. In view of our finding that evidence before the trial Court was not sufficient to sustain its findings on issues 2 to 4, we have no course open, except to allow this appeal. Since the findings on the other issues depend largely on issues 2 to 4, we also vacate the findings on those issues as well. In the nature of the pleadings, we are also of the opinion that both parties should be allowed to lead additional evidence in respect of all the issues if they seek to do so. The suit will, therefore, stand remitted to the lower Court. Parties may be free to adduce further evidence on all the issues formulated by the trial Court. The trial court shall take back O.S. No. 173 of 1978 on its file and dispose of the same within a period not exceeding six months from the date of receipt of records, which will be transmitted urgently.

The cross appeal relates to the finding on issue No. 3. We have given above our reasons to hold that the findings entered by the trial court on issues 2 to 4 are unsustainable. In this view, the cross-appeal also is allowed.

Parties will suffer their respective costs.

Parties will appear before the lower court on 12th December, 1989.