2024:KER:15091

C. R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE SATHISH NINAN

TUESDAY, THE 27TH DAY OF FEBRUARY 2024 / 8TH PHALGUNA, 1945

RFA NO. 349 OF 2022

AGAINST THE JUDGMENT IN OS 62/2019 OF SUB COURT, SULTHANBATHERY

APPELLANT/PLAINTIFF IN OS 62/2019:

AHAMMEDKUTTY BRAN,
S/O. POCKER HAJI, AGED 48 YEARS, BRAN HOUSE, EDAVAKA AMSOM, EDACHANNA DESOM,
ELLUMANNAM POST MANANTHAVADY TALUK, PIN-670645.

BY ADVS.
B.KRISHNAN
R.PARTHASARATHY

RESPONDENTS/DEFENDANTS IN OS 62/2019:

1 SUKUMARAN,
H/O. POTTIYAN R. ROSAMMA, AGED 75 YEARS, THACHARIATH HOUSE, KARICKAM, KOTTARAKKARA POST,
KOTTARAKKARA TALUK, KOLLAM-691 506.

2 SWAPNA SUBASH,
D/O. POTTIYAN R. ROSAMMA, AGED 43 YEARS, THACHARIATH HOUSE, KARICKAM, KOTTARAKKARA POST, KOTTARAKKARA TALUK, KOLLAM-691 506.

BY ADVS.
ANCHAL C VIJAYAN
M.NARENDRA KUMAR

THIS REGULAR FIRST APPEAL HAVING COME UP FOR HEARING ON 27.02.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

2024:KER:15091

C. R.

SATHISH NINAN, J.

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R. F. A. No.349 of 2022

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Dated this the 27th day of February, 2024

J U D G M E N T

Challenging the dismissal of a suit for return of advance sale consideration, the plaintiff is in appeal.

2. Ext.A1 agreement dated 11.11.2013 was entered into between the plaintiff and the predecessor of the defendants, Rosamma. As per Ext.A1, an extent of 25 cents with the residential building thereon was agreed to be conveyed by Rosamma to the plaintiff for a sale consideration of ₹ 62.50 lakhs. On the date of agreement an amount of ₹ 12.5 lakhs was paid towards advance sale consideration. The balance consideration was payable on or before 11.05.2014. Alleging breach of the agreement by the defendants, the suit was filed for return of the advance sale consideration.

3. The defendants admitted Ext.A1 agreement executed by the predecessor. It was contended that the

agreement was entered into for raising of funds for the treatment of their mother Rosamma. Consequent on the failure of the plaintiff to pay the balance sale consideration, there occurred breach. Rosamma had entered into an agreement for sale with the third party-Rajan for purchase of his property. An amount of ₹ 13 lakhs was paid towards advance sale consideration. Consequent on the failure of the plaintiff to perform Ext.A1 agreement, the said transaction could not go through. Though a suit was filed against the said Rajan for return of the advance sale consideration, the same was dismissed for the inability of Rosamma to pay court fee. It was contended that the suit is barred by limitation. On these allegations a counter claim was raised for damages of ₹ 13 lakhs.

4. The trial court dismissed the suit and the counter claim as barred by limitation. There is no appeal by the defendants challenging the dismissal of

the counter claim. Therefore, the claim for damages by the defendants does not survive for consideration.

5. I have heard Sri.B.Krishnan, the learned counsel for the appellant and Sri.M.Narendra Kumar the learned counsel for the respondent.

6. The points that arise for determination are :-

(i) Relief having been claimed for money charged on immovable property is not Article 62 of the Limitation Act applicable ?

(ii) Is the plaintiff entitled for charged decree in terms of Section 55(6)(b) of the Transfer of property Act ?

7. The relief claimed in the plaint reads thus:-

"Directing the Defendants jointly as legal heirs of Late Smt.Pottiyan R. Rosamma to pay to the Plaintiff an amount of Rs.21,50,000.00 (Rupees Twenty One lakhs and Fifty Thousand only) with interest thereon @ 12% per annum from the date of this Suit till realization and cast the same as a charge over the Plaint schedule properties."

The relief contains two parts-first part seeking personal decree and the second part claiming a decree

charged on the plaint schedule properties. In case of breach of an agreement for sale, even if the purchaser is found to be responsible for the breach, still, unless the seller proves that he suffered damages consequent to the breach, he is bound to return the sale consideration or the part thereof, as may have been received by him. In ***Kannan Menon v. Kuttikrishna Menon and Ors. 1962 KLJ 257,*** this Court held :-

> *"It follows therefore that any payment made of part of purchase money at the time of the contract for sale, must, even if the blame for its breach is on the buyer, be refunded to the buyer."*

In ***Saramma v. Varghese [Laws (Ker) 2014 (9) Page 1],*** a Division Bench of this Court held :-

> *"The provisions under section 55 of the Transfer of Property Act do not provide for retention of advance money by the vendor in the event of any breach on the part of purchaser."*

In ***Crompton Greaves Limited. v. Icon Integrated Industries and Software Ltd. 2021 (3) KLT 377(D.B),*** it was held :-

> *".....A vendee through whose default a contract for sale falls, is entitled to recover the amount of purchase money paid by him and the vendor can only resist the claim by seeking to set off against the said sum any damages which he might have incurred by a reason of the vendee's non performance of the contract. ....."*

The Division Bench relied on the judgments of the Apex Court in ***Fateh Chand v. Balkishan Dass AIR 1963 SC 1405*** and ***Kailash Nath Associates v. Delhi Development & Anr. (2015) 4 SCC 136***. Therefore, the right of the purchaser under an agreement for sale, to get refund of the sale consideration or part thereof as may have been paid by him under the agreement, even in a case where breach of the agreement was committed by him is well recognised under law. The claim cannot be negatived unless the vendor proves that he had suffered damages consequent on such breach. On proof of damages, such amount could be recovered.

8. With regard to the first part of the relief claimed, that is, a personal decree, Article 54 of the Limitation Act applies. The period provided is three years from the date of accrual of the cause of action. It is conceded before me, and rightly so, that the suit has been filed beyond that period. The trial court was right in having held that the first part of the claim is barred by limitation.

9. Coming to the second part of the relief, the plaintiff claims a decree charged on the plaint schedule property. The charge is one provided under Section 55(6)(b) of the Transfer of Property Act. When charge is claimed over the property, Article 62 of the Limitation Act applies and the plaintiff is entitled for a period of twelve years to institute the suit. Therefore, the suit seeking a charged decree over the plaint schedule property is well within the period of limitation. The trial court has not considered the same. Accordingly it

is held that, the suit in so far as it seeks to enforce the charge over the plaint schedule property, is within the period of limitation.

10. Now coming to the question as to whether the plaintiff is entitled for a charged decree, it would be appropriate to refer to Section 55(6)(b) of the Transfer of property Act. The same reads thus:-

> *"(6) The buyer is entitled—*
>
> *(a) xxxxx xxxxx xxxxx xxxxx*
>
> *(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."*

As is evident therefrom, the plaintiff would not be entitled for a charge if he has failed to accept

delivery of the property. The Section deals with two contingencies; (i) where the buyer has not improperly declined to accept delivery of the property, and (ii) where the buyer properly declines to accept delivery. In the first situation he is entitled for charge over the property for the purchase money paid and interest thereon. In the second event, in addition to the above he is entitled for charge even for the earnest money if any paid and for costs.

11. The words "accept delivery" occurring in the Section is to be understood as, accepting the performance of the contract, and not merely taking delivery of the property in its literal sense. The Law Commission of India in its 70th report stated,

> *"The next comment which we will like to make on section 55(6) (b) is that where it speaks of the purchaser improperly declining to accept delivery, it obviously has in mind some such elaborate notion as "accept the completion of the contract by*

the execution of the conveyance or the delivery of the property as the case may be".

The point of time for taking delivery of the property may vary according to the terms of the contract. On a meaningful understanding of the provision it can only be construed as, "accepting the performance of the contract".

12. Both limbs of the Section refer to, "declining to accept delivery"; the first part states, 'unless he has improperly declined', and the second part says, 'when he properly declines'. The words "unless he has improperly declined", would suggest that it means "if he has properly declined". Obviously, in the light of the second part of the Section, that cannot be what is intended. When the words "unless he has improperly declined" occurring in the first part of the section and "when he properly declined" occurring in the second part of the section are considered side by side, they suggest

three situations, (i) properly declined, (ii) improperly declined, and (iii) where there is neither a proper nor improper declining. Situations where the declining is proper has been taken care of in the second part of the section. Improper declining, as is evident on a plain reading of the section, negates charge. There could be cases where an agreement for sale does not go through for no fault of either the vendor or the vendee. So also, there could be instances where both the parties are at blame, both having contributed for the non-performance. May be the buyer was not too eager and the seller was not too particular to carry the agreement through. There could also be instances where the seller is unable to perform for various reasons. In such cases it could not be said that the buyer has improperly declined to accept delivery. There being no improper declining by the buyer to accept delivery, he is entitled for charge over the property for the purchase

price paid. Sanjiva Row in his commentaries on Transfer of Property Act, 8th edition, page 738 states,

> *"Where the contract fails to be performed completely, but that failure of performance is not attributable entirely to the vendor and the contract is rejected by the purchaser, in such a case, where both the parties are to blame, more or less, the case does not fall within the expression "unless the buyer improperly declines to accept delivery" provided the facts and circumstances are such that it can be said that the buyer has not improperly refused delivery. Where both the parties are to blame, more or less, it cannot always be said that the buyer has rejected the contract, or has improperly refused to take delivery : for the purchaser would have been willing to perform the contract, if the vendor had performed those things, which, in good faith, he was bound to do.*
>
> *The words 'improperly declined' should have a proper meaning attributed to them. The default of the vendor may be due to some accident or misfortune, even though there may be no fault on the part of the vendor. The question was posed in Whitbread & Co., Ltd., v. Watt, by Vaughan williams, L.J., [(1902)1 Ch 834]thus :*
>
> *"Suppose, a person contract to sell a property and the purchaser pays a deposit and owing to some fact not being misconduct on either side, the contract goes off, has the purchaser a lien on the estate for his deposit?"*
>
> *It was observed that "it is no default, it is rather misfortune".*

In ***Thomas George v. A.T. Joseph & Ors. 2016 (1) KLJ 336*** this Court held :-

> *"..... A close reading of Section 55(6)(b) of the Transfer of Property Act would indicate that the creation of charge as per the said provision dependent on the issue as to whether the buyer has improperly declined to accept delivery of the property. It is thus evident that if the buyer does not*

improperly declines to accept delivery of the property as per the terms of the agreement, a charge will be created in favour of the buyer in respect of the property by operation of the provision contained in Section 55(6)(b). ....."

In ***Videocon Properties Ltd v. Dr. Balachandra Laboratories & others, 2004(3)SCC 711***, the Apex Court observed that, the principle underlying the provision is the trite principle of justice, equity and good conscience.

13. Thus understanding the scope of the first limb of Section 55(6)(b), it is held that, where the non-performance is not due to the fault of the buyer and the seller, or where both are at blame/default, or where the default occurred at the hands of the vendor, it cannot be said that the buyer has improperly declined to accept delivery and hence he is entitled for charge over the property for the purchase price paid and interest. Of course, whether interest is to be granted and if so at what rate are all matters for determination based on the

facts of each case.

14. Bearing the above principle in mind I proceed to discuss the facts and evidence in the case. The learned counsel for the plaintiff would draw the attention of the Court to the averment at paragraph one of the plaint that, sale deed could not be executed in pursuance of Ext.A1 since late Rosamma-the predecessor of the defendants was unable to find an alternate property to shift the residence. It is the inability of Rosamma to find a suitable accommodation to shift the residence which lead to the non-performance of Ext.A1 agreement, it was argued. At paragraph 9 of the written statement it was stated that Rosamma had identified another property which contained a house, and an agreement for sale was also entered into with its owner, one Rajan.

15. Ext.A5 is the copy of the plaint dated 16.07.2014 in OS 22/2014 filed by Rosamma against the

said Rajan. Ext.A5 shows that the agreement with Rajan was not proceeded further and the suit is filed only for return of advance sale consideration. At paragraph 6 of Ext.A5 plaint it is stated that she had approached the said Rajan with the balance sale consideration in spite of which he did not execute the sale deed. The relevant sentence reads thus,

> "ആയതു പ്രകാരം 26.05.2014 തിയ്യതി അന്യായക്കാരി പട്ടിക വസ്തുവഹകളുടെ ബാക്കി തീരുവിലയുമായി പ്രതിയെ നേരിട്ട് സമീപിച്ച് തീരാധാരം രജിസ്റ്റർ ചെയ്തുതരുവാൻ ആവശ്യപ്പെട്ടതിൽ പ്രതി വസ്തുതീരാധാരം രജിസ്റ്റർ ചെയ്തു തരുവാനോ, ബാക്കി പ്രതിഫല സംഖ്യ അന്യായക്കാരിയിൽ നിന്നും കൈപ്പറ്റുന്നതിനോ തയ്യാറായില്ലാത്തതും ആണ്."

However, the suit was filed only for return of the sale consideration. There is no case for the defendants that, by that time an alternate residence was found out. Coupled with the above, the learned counsel for the appellant would draw the attention of the Court to the cross-examination of DW1 wherein she has stated that the

alternate residence available for Rosamma was only the house of her relative. The learned counsel would also rely on the deposition of DW1 wherein it was that, the plaintiff had permitted them to reside in the property as long as they want. The deposition reads thus,

> "രാജനുമായിട്ടുള്ള കച്ചവടം നടക്കാതെ റോസമ്മയ്ക്ക് മാനന്തവാടിയിൽ താമസിക്കാൻ വേറെ വീടില്ലായിരുന്നു എന്ന് പറഞ്ഞാൽ ബന്ധുവീടുണ്ടായിരുന്നു. കൂടാതെ അന്യായക്കാരൻ തന്നെ ഞങ്ങളോട് എത്രകാലം വേണമെങ്കിലും അന്യായപ്പട്ടികയിലെ വീട്ടിൽ താമസിക്കാം എന്ന് പറഞ്ഞിരുന്നു.".

All the above indicate that Rosamma was unable to find out an alternate house to shift the residence. This suggests that the predecessor of the defendants were not in a position to perform the agreement. It is in the said background that the averment in the plaint at paragraph 1 that, sale deed could not be executed in pursuance of Ext.A1 since late Rosamma was unable to

find an alternate property to shift the residence assumes significance.

16. The defendants allege that the plaintiff did not have sufficient funds with him to get the sale deed executed. The plaintiff was evading performance of the contract, it is alleged. No evidence is adduced by the plaintiff to prove that he was possessed of sufficient means to go ahead with the transaction. This tells upon the readiness of the plaintiff to go ahead with the transaction. On appreciating the entire evidence it appears that both the plaintiff and the defendants (their predecessor Rosamma) contributed to the non-performance of Ext.A1 agreement. As held supra, in such a situation, when both the plaintiff and the defendant are at fault or were not eager in the performance of the agreement, the plaintiff is entitled for charge over the property for the sale consideration paid. A decree is liable to be granted to the plaintiff, as above.

17. Now coming to the grant of interest, taking note of the entire facts including the delay in institution of the suit, it is deemed appropriate that interest be declined till the date of suit. The plaintiff could be granted interest at the rate of 6% per annum from the date of suit till the date of realisation.

Resultantly, the appeal is allowed. The decree and judgment of the trial court are set aside. The plaintiff is granted a decree for realisation of ₹ 12,50,000/- (Rupees Twelve Lakhs Fifty Thousand only) with interest at the rate of 6% per annum from the date of suit till realisation charged on the plaint schedule property. No costs.

Sd/-
SATHISH NINAN
JUDGE

kns/-

//True Copy//

P.S. to Judge