

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

THURSDAY, THE 7TH DAY OF APRIL 2022 / 17TH CHAITHRA, 1944

RSA NO. 529 OF 2015

(AGAINST THE JUDGMENT & DECREE DTD.23.3.2015 IN AS.NO.12/2008 OF
ADDITIONAL DISTRICT COURT, IRINJALAKUDA
AGAINST THE JUDGMENT AND DECREE DATED 31.10.2007 IN
OS.NO.392/2006 OF ADDITIONAL SUB COURT, IRINJALAKUDA)

APPELLANT/RESPONDENT/DEFENDANT:

BHASY, AGED 40 YEARS, S/O.MANIKKATHUPARAMBIL AUGUSTHI,
ALATHUR PO, MELADOOR DESOM,MUKUNDAPURAM TALUK.

BY ADV SRI.T.N.MANOJ

RESPONDENTS/APPELLANT/PLAINTIFF:

1 * THOMAN, AGED 75 YEARS (DIED),
S/O.ILANJIKKAL OUSEPH, MELADOOR DESOM,
ALATHUR VILLAGE, MUKUNDAPURAM TALUK-680 741.

ADDL.2 JOSE, AGED ABOUT 59, S/O.LATE THOMAN, ELANJIKKAL HOUSE,
MELADOOR DESOM, ALATHUR VILLAGE, CHALAKUDY TALUK,
TRISSUR DISTRICT-680 741.

" 3 DAVIS, AGED ABOUT 57, S/O.LATE THOMAN,
ELANJIKKAL HOUSE, MELADOOR DESOM, ALATHUR VILLAGE, CHALAKUDY
TALUK, TRISSUR DISTRICT-680 741.

" 4 RAJU, AGED ABOUT 56, S/O.LATE THOMAN, ELANJIKKAL HOUSE,
MELADOOR DESOM, ALATHUR VILLAGE, CHALAKUDY TALUK, TRISSUR
DISTRICT - 680 741.

" 5 KURIYAPPAN,AGED ABOUT 58, S/O.LATE THOMAN, ELANJIKKAL HOUSE,
SNEHAGIRI,KURUVILASSERY POST, CHALAKUDY TALUK, TRISSUR
DISTRICT - 680 732.

(THE LEGAL HEIRS OF DECEASED SOLE RESPONDENT ARE IMPEADED AS
ADDITIONAL RESPONDENTS 2 TO 5 AS PER ORDER DATED 31.8.2021 IN
I.A.NO.2/2020)

R2, R3, R5 BY ADV.SRI.G.SREEKUMAR CHELUR

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
07.04.2022, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

This appeal arises from the judgment and decree dated 23.3.2015 passed by the Additional District Court, Irinjalakkuda in A.S.No.12 of 2008. The Appeal Suit arose from O.S.No.392 of 2006 on the file of the Additional Subordinate Judge's Court, Irinjalakkuda. The defendant is the appellant. The plaintiff is the respondent.

2. Material facts relevant for the adjudication of this appeal are briefly narrated below:-

2.1. The plaint schedule property is 59.5 cents of land comprised in S.Nos.1422/2 and 1423/2 of Alathur Village. The property originally belonged to the plaintiff. The plaintiff executed a sale deed in respect of this property as deed No.2689/04 dated 25.8.2004 (Ext.B1) in favour of the defendant.

2.2. The plaintiff pleaded that on the date of execution of the sale deed, the plaintiff had borrowed a sum of Rs.1,00,000/- from the defendant, who is a money lender, and as a security for the transaction Ext.B1 sale deed was executed. According to the plaintiff, he had retained possession of the plaint schedule property with him.

The plaintiff further pleaded that on 25.8.2004 itself, the parties entered into an oral agreement in which the defendant had agreed to re-convey the plaint schedule property on payment of Rs.1,00,000/- with interest at the rate of 12% per annum. Towards the oral karar, the plaintiff paid Rs.10,000/- on 5.3.2005 and Rs.14,500/- on 30.7.2005 as advance. On 4.8.2006, the plaintiff requested the defendant to re-convey the plaint schedule property after receipt of the amount due to him. The defendant refused to execute the sale deed as requested by the plaintiff.

2.3. The defendant resisted the suit contending that he never lent money to the plaintiff. The defendant had paid Rs.1,78,500/- to the plaintiff on 25.8.2004 and purchased the plaint schedule property. Immediately after the execution of the assignment deed in respect of the plaint schedule property, the defendant was given possession of the same. The plaintiff has no right or possession over the property. The oral contract alleged to have been entered into between the parties is baseless. The defendant never agreed to re-convey the property as pleaded by the plaintiff. Payment of the advance amount as pleaded by the plaintiff is also false. There was a jack fruit tree in the plaint schedule property which was sold to the plaintiff and towards the value of that tree the plaintiff had paid

Rs.10,000/- and at the time of cutting and removing the tree a sum of Rs.14,500/- more was given.

3. The parties went to trial. PWs 1 and 2 were examined and Exts.A1 to A5 were marked on the side of the plaintiff and DW1 was examined and Exts.B1 to B7 were marked on the side of the defendant. Exts.C1 and C1(a) were marked as Court exhibits.

4. The trial Court dismissed the suit holding that the plaintiff is not entitled to the specific performance of the contract as pleaded.

5. The plaintiff challenged the decree and judgment of the Trial Court by filing A.S.No.12 of 2008 before the District Court. The First Appellate Court reversed the judgment and decree of the Trial Court and decreed the suit allowing the plaintiff specific performance of the contract on deposit of Rs.76,500/- with interest at the rate of 12% per annum from 25.8.2004.

6. The defendant is in appeal challenging the judgment of the First Appellate Court under Section 100 of the Code of Civil Procedure.

7. This Court admitted the appeal and formulated the following substantial questions of law:-

- "1. Does not Exhibit B1 deed of sale carry a mandatory presumption under section 34(2)(a) of the Registration Act with regard to its execution and registration, and in the

absence of pleadings or evidence tendered by the plaintiff to rebut such presumption, whether the appellate court was justified in granting a decree for specific performance with regard to the property covered by Exhibit B1 on the strength of the interested oral evidence of the plaintiff alone?

2. Is not the presumption with regard to the principle that possession follows title, applicable to this case since the title of the defendant covered by Exhibit B1 deed of assignment was obtained from the plaintiff himself, which itself speaks volumes about the transfer of title and possession of the plaint schedule properties?
3. In the absence of pleadings or evidence impugning the validity or execution of Exhibit B1 deed of assignment, instead of admitting its execution, whether the plaintiff is entitled to the benefit of Section 91 or the proviso to Section 92 of the Evidence Act to tender evidence assailing the execution and the validity of Exhibit B1, and whether the appellate court is justified in reversing the decree and judgment of the trial court accepting the evidence rendered by the plaintiff as sufficient to rebut the presumptive value of Exhibit B1 of assignment.
4. Is not the plaintiff burdened to prove the borrowal of an amount of Rs.1 lakh from the defendant, in exchange of execution of Exhibit B1 deed of assignment, and in the absence of any evidence with regard to the borrowal of an amount of Rs.1 lakh and also to substantiate the plea of oral agreement for sale, whether the appellate court was justified in reversing the decree and judgment of the court below granting a decree for specific performance treating the amounts shown in Exhibit B1 as part of the sale consideration of the oral agreement for sale?"

8. Heard Sri.T.N.Manoj, the learned counsel for the appellant/defendant and Sri.G.Sreekumar Chelur, the learned counsel appearing for the respondent/plaintiff.

9. The case set up by the plaintiff is that he had borrowed a sum of Rs.1,00,000/- from the defendant as a security for the transaction on 25.08.2004. He executed Ext.B1 sale deed in favour of the defendant and on that day itself, the parties entered into an oral agreement in which the defendant had agreed to re-convey the property covered by Ext.B1 sale deed on payment of the amount borrowed with interest at the rate of 12% per annum. The plaintiff also pleaded that he paid a total amount of Rs.24,500/- on two occasions towards the advance consideration.

10. The challenge of the defendant is that he had not lent money to the plaintiff. According to the defendant, as per Ext.B1 sale deed dated 25.8.2004, he purchased the plaint schedule property and obtained the possession over the same and he continued to be in possession of the property. The defendant also denied the oral agreement as pleaded by the plaintiff. According to the defendant, the plea of the plaintiff that he had paid Rs.24,500/- on two occasions towards advance is baseless. The defendant pleaded that he had sold a jack fruit tree to the plaintiff and initially, he had received Rs.10,000/- from the plaintiff as part consideration of the value of the jack fruit tree and received the balance sum of Rs.14,500/- from the plaintiff at the time of cutting and removing the tree.

11. The First Appellate Court, after appreciating the rival contentions relied on the following circumstances to hold that the plaintiff established a case that he is entitled to specific performance of the oral contract; (1) The defendant failed to establish with cogent evidence the passing of consideration as pleaded by him for the sale of the landed property; (2) The defendant also failed to produce any document to establish the transaction in relation to the sale of the jack fruit tree to the plaintiff; (3) If the transaction in relation to the sale of jack fruit tree, as contended by the defendant, had been true, the market value of the entire plaint schedule property would have been much more higher than the consideration stated in Ext.B1; (4) The plaint schedule property is lying contiguous with the remaining properties owned and possessed by the plaintiff which supports the case of the plaintiff that he has been in possession of the plaint schedule property; (5) The fact that prior title deeds were also obtained by the plaintiff along with Ext.B1 indicates that the transaction was not a sale but, a money transaction.; (6) The evidence regarding a complaint before the Police, wherein the defendant had promised to re-convey the property on payment of the amount with interest, would probabalise the case of the plaintiff.

12. The learned counsel for the appellant/defendant contended that Ext.B1 sale deed, a registered document, carries a mandatory presumption under Section 34(2) of the Registration Act with regard to execution and registration and in the absence of pleadings and cogent evidence tendered from the side of the respondent/plaintiff to rebut such a presumption, the First Appellate Court was not justified in granting a decree for specific performance. The learned counsel would further contend that the First Appellate Court ignored the settled principle that there must be cogent and reliable evidence to grant the specific performance based on an oral agreement. As the defendant established that he has title over the plaint schedule property by virtue of Ext.B1 the principle that 'possession follows title' is applicable to the facts of this case. In the absence of convincing and cogent evidence, the plaintiff is not entitled to adduce evidence invoking the proviso to Section 92 of the Evidence Act. The plaintiff failed to establish borrowal of an amount of Rs.1,00,000/- from the defendant in exchange for execution of Ext.B1 deed of assignment.

13. The learned counsel for the plaintiff contended that the plaintiff could adduce sufficient evidence to enter into a conclusion that

there was an earlier agreement for re-conveyance between the parties at the time of execution of Ext.B1 sale deed and there is no prohibition in adducing oral evidence in regard to the nature of the document. The plaintiff could establish the possession of the plaint schedule property. The circumstances relied on by the First Appellate Court to enter into the conclusion that there was an oral contract between the parties agreeing re-conveyance on payment of the amount borrowed are probable.

14. The plaintiff gave evidence in support of his pleadings as PW1. His wife was examined as PW2. PW1 deposed that the defendant is a money lender and while he was in need of Rs.1,00,000/- he approached him and borrowed money. According to PW1, it is only as a security that he had executed Ext.B1. PW1 further testified that on the date of execution of Ext.B1 there was an oral contract between himself and the defendant whereby the defendant agreed to re-convey the property on payment of the sum of Rs.1,00,000/- together with interest at the rate of 12% per annum. According to PW1, he paid Rs.10,000/- on 5.3.2005 and Rs.14,500/- on 30.7.2005 towards the value of the plaint schedule property. The defendant was not willing to re-convey the property. PW2, the wife of the plaintiff also supported

the case of the plaintiff. PW1 relied on Ext.A2 letter alleged to have been sent by the defendant to his son Raju.

15. The defendant gave evidence as DW1. He denied the money transaction as pleaded by the plaintiff. He also denied the genuineness of Ext.A2 letter. DW1 admitted that he had received Rs.24,500/- but it was towards the value of a jack fruit tree sold to the plaintiff. According to DW1, he had paid Rs.1,78,500/- towards the sale consideration of the plaint schedule property at the time of execution of Ext.B1. He deposed that he had received Exts.B2 and B3, the prior title deeds in respect of the property, at the time of the assignment of the property. DW1 remitted land tax in respect of the property as per Ext.B4.

16. Going by Ext.B1, what is evident is that an outright sale as provided under Section 54 of the Transfer of Property Act had taken place. Ext.B1 is a registered sale deed. The specific case of the defendant is that he had no money transaction as pleaded by the plaintiff. Both sides adduced evidence in support of their rival contentions. Apart from the interested testimonies of PWs 1 and 2, the plaintiff and his wife, there is no other convincing evidence or circumstance to enter into a conclusion that an oral agreement in respect of the sale of the property had taken place on 25.8.2004. In

Grasim Industries Ltd. v. Agarwal Steel [(2010) 1 SCC 83] the Apex Court held that when a person signs a document, there is a presumption, unless there is proof of force or fraud, that he has read the document properly and understood it and only then he has affixed his signature thereon, otherwise no signature on a document can ever be accepted.

17. In **Prem Singh v. Birbal [2006 (2) KLT 863 (SC)]** the Apex Court held that there is a presumption that a registered document is validly executed. The registered document, therefore, *prima facie* would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In **Vimal Chand Ghevarchand Jain and Ors. v. Ramakant Eknath Jadoo [(2009) 5 SCC 713]** the Apex Court held that a registered deed of sale carries the presumption that the transaction was a genuine one and that if the execution of sale deed is proved, onus is on the defendant to prove that the deed is not executed and it was a sham document.

18. In **Seema v. Johny Thomas (2012 (3) KLT 207)** this Court held that in the case of a registered document, the presumption under Section 34 of the Registration Act would come into play to infer that there was due execution of the document.

19. In the present case, the plaintiff failed to lead cogent evidence to rebut the presumption available to a registered document.

20. Coming to the question of acceptability of the oral agreement for sale, it is trite that a sale agreement can also be oral and it is not necessary that the agreement be written. What is more important is that it should be within the ambit of Section 10 of the Indian Contract Act, and all oral and written agreements shall fulfill the conditions specified in Section 10 of the Act. In

Ouseph Varghese v. Joseph Aley (1969 KHC 242, Paragraph 8), the Apex Court held thus:-

"It appears likely that neither side has come forward with the true version. But before a court can grant a decree for specific performance, the contract pleaded must be a specific one and the same must be established by convincing evidence. Rarely a decree for specific performance is granted on the basis of an agreement supported solely by oral evidence. That apart, as mentioned earlier, in this case the oral testimony adduced in support of the agreement pleaded is a highly interested one. We do not think that the Trial Court was justified in relying on that testimony for granting the decree prayed for. The Trial Court itself observed in the course of its judgment (para 12) that "there is no clear cut evidence for proving the terms of the oral contract which is alleged to have been entered into by the plaintiff and the 1st defendant". This finding alone should have been sufficient to non-suit the plaintiff. Therefore we agree with the High Court, though for reasons

other than those mentioned by it that the plaintiff has failed to prove the agreement pleaded in the plaint.”

21. In **Balakrishnan v. Yakoob and Others [2001 KHC 32]**, this Court held that even though preponderance of probability constitutes sufficient ground for decision in civil proceedings there must be cogent and reliable evidence to base a suit for specific performance on the basis of an oral agreement. In **Ummer and another v. Kunhava alias Ahammedkutty [2007 (4) KHC 315]**, this Court held that a decree for specific performance could not be granted based on an oral agreement supported by evidence unless there is cogent evidence to prove the agreement.

22. In **Brij Mohan and Others v. Sugra Begum and Others [(1990) 4 SCC 147]** the Apex Court held that in a case where the plaintiffs come forward to seek a decree for specific performance of a contract of sale of immovable property on the basis of an oral agreement alone, a heavy burden lies on the plaintiffs to prove that there was consensus ad idem between the parties for a concluded oral agreement for the sale of immovable property.

23. In the case on hand, the plaintiff failed to establish evidence on the touchstone of the principles discussed above to establish the existence of an oral contract as pleaded. Apart from the interested testimonies of the plaintiff and his wife, no other convincing evidence is available to show that there was an oral agreement.

24. The First Appellate Court held that the defendant failed to establish the payment of consideration as shown in Ext.B1 sale deed and that no documents were produced on the side of the defendant to establish that the transaction that took place on 5.3.2005 was in respect of the sale of jack fruit tree. The First Appellate Court also observed that if the transaction as pleaded by the defendant relating to the sale of the jack fruit tree had been true, the market value of the property would have been much higher than the value shown in Ext.B1. This Court is of the view that the First Appellate Court has not correctly applied the principles of evidence relating to the burden of proof in the facts of this case. The First Appellate Court has also concluded that the plaintiff is in possession of the property relying on the evidence that it is lying contiguous to the remaining properties of the plaintiff. Ext.B1 recites that the possession had passed to the defendant. He has given oral evidence that he is in possession of the property. He has remitted land tax in respect of the property. The acquisition of title over the

plaint schedule property by the defendant as per Ext.B1 stands established. The word "possession" as applied to property, is having different meanings both in common speech and legal parlance. Possession is one of the elements of legal title since the title implies possession. The possession will be presumed to be in subordination to the true owner. In the present case, the plaintiff failed to show that he is still in possession of the plaint schedule property. Right of possession over a property is a facet of title. The legal fiction consequent to the execution of Ext.B1 sale deed is that the plaintiff stands dispossessed.

25. The First Appellate Court further held that evidence regarding handing over of the prior title deeds in respect of the plaint schedule property to the defendant indicates that the transaction was not one for purchase of suit property but a money transaction. The First Appellate Court relied on the decision in **Sarada v. Divakara Kurup (2012 (4) KLT SN 152 (C.No.148)** in support of this finding. In **Sarada's** case, this Court was dealing with a case in which the genuineness of an agreement for sale in respect of a property was under challenge. The plaintiff therein pleaded that the original title deeds were also handed over along with the agreement for sale. In that situation, this Court held that handing over the original documents to the respondent at the time of execution of the sale agreement was a

circumstance that indicated that the transaction was not one for purchase of the suit property but a money transaction. The ratio in **Sarada's** case (supra) is distinguishable on the facts. In the present case, it was after the execution of the sale deed the prior title deeds were handed over to the defendant. While dealing with the finding of the First Appellate Court in this regard, it is relevant to refer to sub-section (3) of Section 55 of the Transfer of Property Act. Sub-section (3) of Section 55 of the Transfer of Property Act reads thus:-

"55. Rights and liabilities of buyer and seller.—

In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

- | | | | |
|-----|----|----|----|
| (1) | xx | xx | xx |
| (2) | xx | xx | xx |

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyers of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyer, as the case may be, and at the cost of the

person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident."

As per sub-section (3) of Section 55 of the Transfer of Property Act where the whole of the purchase-money has been paid to the seller and the entire property covered by the document of title was assigned, the purchaser is entitled to the prior title deeds.

26. Therefore, the circumstance that the prior title deeds were transferred to the defendant would not indicate that the transaction was a money transaction but would only indicate that it was an actual sale in respect of the property covered by it.

27. The learned counsel for the plaintiff contended that there is no prohibition in adducing oral evidence in regard to the nature of Ext.B1. This Court is in perfect agreement with the contentions of the learned counsel for the plaintiff. The plea of an oral contract for re-conveyance can be accepted if there is cogent and convincing evidence to establish it. It was open to the plaintiff to adduce oral evidence in regard to the nature of the document. But, in the present case, the plaintiff did not discharge the burden of proof in respect of the property

thereof, which was certainly on him. In the present case, a heavy burden is cast on the plaintiff to prove what actually happened on 25.8.2004 and with regard to the borrowal of Rs.24,500/- and execution of Ext.B1 deed of assignment, the plaintiff failed to discharge the burden cast on him.

28. The First Appellate Court misconstrued the evidence and failed to draw necessary presumptions and inferences on the pleadings and evidence. The First Appellate Court lost sight of the settled principle that a decree for specific performance could not be granted based on an oral agreement unless there was cogent evidence to prove the same. The finding of the First Appellate Court that the plaintiff is in possession of the plaint schedule property is contrary to the evidence available. The First Appellate Court was not justified in reversing the decree and judgment of the trial Court. The Court also lost sight of the evidentiary burden on the plaintiff by invoking the proviso under Section 92 of the Evidence Act assailing the execution of Ext.B1. The resultant conclusion is that the judgment and decree passed by the First Appellate Court are liable to be set aside.

In the result, the Regular Second Appeal is allowed. The judgment and decree passed by the Additional District Court, Irinjalakkuda in A.S.No.12 of 2008 are set aside. The judgment and

decree passed by the Additional Subordinate Judge's Court, Irinjalakkuda in O.S.No.392 of 2006 are restored. The Parties are directed to bear their respective costs.

Sd/-
K.BABU
Judge

TKS