



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

TUESDAY, THE 17TH DAY OF JUNE 2025 / 27TH JYAISHTA, 1947

RFA NO. 725 OF 2008

OS NO.194 OF 2007 OF II ADDITIONAL SUB COURT,KOZHIKODE

APPELLANTS/DEFENDANTS

- 1 VIMALA SNEHAM (DIED), D/O PHILIP SNEHAM,
PENSIONER,UPASANA, MULANTHALA PARAMBA, CHAVAYOOR
AMSOM, DESOM, P.O.MERIKUNNU, KOZHIKODE TALUK.
- 2 M.AJITHKUMAR,S/O.S.ARUL DAS.S.
BUSINESS, CHAVAYUR AMSOM, DESOM, P.O.MARIKUNNU,
KOZHIKODE TALUK.
- ADDL.3 GEETHA.B.ARULDAS
AGED 67 YEARS, D/O. LATE S.ARULDAS, JYOTHI, M7/16,
MALAPARAMBA HOUSING COLONY, KOZHIKODE - 673 009.
- ADDL.4 ASHA GEORGE
AGED 57 YEARS, D/O.LATE S.ARULDAS, AMRIT RETREAT
GOKULAM APARTMENTS, B11 K.P. VALLON ROAD,
KADAVANTRA, ERNAKULAM.
- ADDL.5 MOLLY PHILIPS
AGED 60 YEARS, W/O.LATE RANJITH KUMAR PHILIPS,
GRACE VILLA, KONOTH P.O., KURUVATTOOR, KOZHIKODE.
- ADDL.6 SHARON PHILIPS
AGED 34 YEARS, D/O.LATE RANJITH KUMAR PHILIPS,
GRACE VILLA, KONOTH P.O., KURUVATTOOR, KOZHIKODE.



ADDL.7 ANISHA PHILIPS
AGED 25 YEARS, D/O.LATE RANJITH KUMAR PHILIPS,
GRACE VILLA, KONOTH P.O., KURUVATTOOR, KOZHIKODE.
(ADDITIONAL APPELLANTS 3 TO 7 ARE IMPEADED AS
LEGAL REPRESENTATIVES OF DECEASED FIRST APPELLANT
VIDE ORDER DATED 02/08/2022 IN IA 2/2022.)

BY ADVS.
SRI.M.V.BOSE
SRI.VINOD MADHAVAN
SMT.P.M.MAZNA MANSOOR
SMT.NISHA BOSE

RESPONDENT/PLAINTIFF

BABU JOSEPH, S/O JOSEPH V.S.,
CHARTERED ACCOUNTANT,KOORACHUNDU VILLAGE, ATHIODI
DESOM, KOYILANDY TALUK.

BY ADVS.
SRI.T.KRISHNANUNNI (SR.)
SHRI.C.DILIP
SRI.VINOD RAVINDRANATH
SMT.M.R.MINI
SRI.ASHWIN SATHYANATH
SRI.K.C.KIRAN
SMT.MEENA.A.
SHRI.ANISH ANTONY ANATHAZHATH

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
10.6.2025, THE COURT ON 17.06.2025 DELIVERED THE FOLLOWING:



C.R.

J U D G M E N T

Dated this the 17th day of June, 2025

The defendants 1 and 2 in OS. No.194 of 2007 on the file of II Additional Sub Judge, Kozhikode are the appellants. (For the purpose of convenience the parties are hereafter referred to as per their rank before the trial court).

2. The plaintiff filed the above suit for specific performance. Exhibit A1 is the sale agreement entered into between the plaintiff and the defendants on 15.1.2007, whereby the defendants agreed to sell the schedule property consisting of 11.77 cents, for a total consideration of Rs.10.75 Lakhs. On the date of agreement itself, a sum of Rs.2,00,000/- was paid as advance. As per the terms of Exhibit A1, a further sum of Rs.3,00,000/- was to be paid by the plaintiff to the defendants within a period of one month and the entire balance amount is to be paid and the sale deed also is to be executed within 3 months. Accordingly, the plaintiff paid Rs.2,75,000/- on 29.1.2007, Rs.25,000/- on 14.2.2007 and another Rs.75,000/- on 27.3.2007. The defendants admitted receipt of a total sum of Rs.5,75,000/- from the plaintiff by 27.3.2007. At the



time of execution of Exhibit A1, the property was mortgaged to a bank. As per the terms of the agreement, the defendants had to redeem the mortgage also before the registration of sale deed. According to the plaintiff, though he was always ready and willing to perform his part of the contract, due to the default of the defendants, the sale deed could not be executed. On the other hand, according to the defendants, the breach was committed by the plaintiff. It was in the above context, the plaintiff filed this suit for specific performance, on 29.5.2007.

3. The trial court framed seven issues. The evidence in the case consists of the oral testimonies of PW1, DW1 and Exhibits A1 to A27 and B1 to B8 series. After evaluating the evidence on record the trial court decreed the suit and directed the defendants to execute a sale deed in performance of Exhibit A1. Aggrieved by the above judgment and decree of the trial court, the defendants preferred this appeal.

4. Now, the points that arise for consideration are the following:

- 1) *Whether the trial court was justified in granting the prayer for specific performance, in the absence of a prayer for declaration that the termination of agreement is not binding*



on him?

2) Whether the plaintiff was always ready and willing to perform his part of the contract?

3) Whether the impugned judgment and decree of the trial court calls for any interference, in the light of the grounds raised in the appeal?

5. Heard Sri. M.V. Bose, the learned counsel for the appellants and Smt. Meena A, the learned counsel for the respondent/plaintiff.

6. The learned counsel for the appellants would argue that in this case time was essence of the contract and within the period stipulated in Exhibit A1, the plaintiff was not ready and willing to perform his part of the contract. He would further argue that on the expiry of the period of Exhibit A1 on 15.4.2007, the contract expired and it was terminated and as such without a prayer for declaration that the termination of the agreement is illegal or not binding on him, a decree for specific performance cannot be granted. He would also argue that, from the pleading and evidence, it is not revealed that the plaintiff was ready with the balance sale consideration of Rs.5,00,000/- within the period of validity of Exhibit A1 agreement.



7. On the other hand, the learned counsel for the respondent/plaintiff would argue that, by the conduct of the parties, they have extended the time stipulated in Exhibit A1 and as such the time is not the essence of the contract, in the facts of this case. Further, the learned counsel would argue that all along the plaintiff was ready and willing to perform his part of the contract and as informed by the defendants, he went to the Sub Registry with the balance sale consideration, after purchasing the stamp paper and preparing the sale deed in the stamp paper and the contract could not be performed due to the failure of the defendants alone. According to the learned counsel, there was no valid termination of contract and as such absence of prayer for declaration is not fatal in this case. Therefore, the learned counsel prayed for dismissing the appeal.

8. On the date of execution of Exhibit A1 on 15.1.2007 itself the plaintiff paid Rs.2,00,000/- as advance. As per the terms of Exhibit A1, the plaintiff was bound to pay a further sum of Rs.3,00,000/- within a period of one month from the date of Exhibit A1 ie., before 15.2.2007. Admittedly, the plaintiff paid a sum of Rs.3,00,000/- by 14.2.2007 (2,75,000 on 29.1.20227 and 25,000/- on 14.2.2007). Therefore, within one month of execution of



Ext.A1, out of the total consideration of Rs.10,75,000/-, the plaintiff paid Rs.5,00,000/- to the defendants. As per the terms of Exhibit A1, the plaintiff has to pay balance sale consideration of Rs.5,75,000/- and get the sale deed executed within a period of three months ie., on or before 15.4.2007. In the meantime, the defendants had the obligation to release the mortgage in respect of the scheduled property. Before the stipulated date, on 27.3.2007 the plaintiff paid another Rs.75000/- to the defendants, making the total payment at Rs.5,75,000/-.

9. From Exhibit B5 receipt issued from the bank it is seen that the defendants redeemed the mortgage on 12.4.2007 and the release deed was registered only on 25.4.2007. According to the plaintiff, he had contacted the defendants several times, expressed his readiness and willingness to pay the balance sale consideration and get the sale deed executed. Finally, he had issued Exhibit A2 lawyer's notice on 4.5.2007, calling upon the defendants to execute the sale deed in his favour, within seven days from the date of receipt of the said notice. On 17.5.2007, a reply notice (Ext.A3) was sent on behalf of the defendants to the plaintiff's counsel informing that due to the default of the plaintiff, Exhibit A1 agreement has expired and that it became



impossible to perform. However, one more opportunity was given in Ext.A3 to the plaintiff, with a rider that he should “ *come to the concerned Registrar's Office on 25.5.2007 (Friday) with prepared sale deed and balance consideration of Rs.5,00,000/- for obtaining registration of sale deed for conveying valid right, title and interest for the total consideration of Rs.10,75,000/-.* ” In the reply notice it was further stated that, unless written reply is given within 48 hours of receipt of the same, expressing his readiness, he will lose the opportunity for amicable resolution.

10. Exhibit A8 is the document produced by the plaintiff to prove that on 23.5.2007 he had sent a telegram to the defendants intimating his readiness to get the sale deed executed on 25.5.2007. Exhibit A9 is a letter issued from BSNL to the plaintiff informing him that the above telegram was served on the defendant on 24.5.2007. In the written statement, the contention taken by the defendants is that they have received the telegram only on 26.5.2007, which appears to be not correct, in the light of Exhibit A9 issued by BSNL.

11. According to the plaintiff, on 2.5.2007, he had purchased stamp paper for Rs.54,000/- and entrusted the scribe for writing the sale deed and



informed the matter to the defendants. Further according to him, when the defendants came to know about the above fact, they insisted to show the full sale consideration in the document. Accordingly he purchased stamp paper worth Rs.1,45,200/-, prepared the sale deed in the stamp paper and waited for the defendants in the Sub Registrar's office on 25.5.2007 with the balance sale consideration. Since the defendants did not turn up, he had surrendered the unused stamp paper and got the amount refunded.

12. Exhibit A14 is the application given by the plaintiff to the Tahsildar requesting for refund of the stamp value. Exhibit A15 is the proceedings of the Tahsildar, Kozhikode dated 23.10.2007 refunding Rs.1,36,428/- after deducting a sum of Rs.8,812/-. Exhibit A4 is the copy of the sale deed prepared by the plaintiff in the stamp paper. The plaintiff has produced Exhibit A10 receipt issued by the SRO, Chevayoor and Exhibit A11 receipt issued by the document writer Anilkumar to prove that on 25.5.2007, he had waited in the Sub registrar's Office for getting the sale deed executed. He has also produced Exhibit A7 copy of repayment schedule issued by the HDFC Bank showing that on 25.5.2007 he has withdrawn a sum of Rs.5,00,000/- and deposited the same amount in the said Bank on the same



day.

13. It was argued by the learned counsel for the defendants that Exhibit A8 telegram was sent by the plaintiff only on 23.5.2007, which according to him is beyond the period offered in Exhibit A3 reply notice and as such it could not be accepted. In Exhibit A3 reply dated 17.5.2007, the defendants specifically stated that if the plaintiff comes to the Sub Registrar's office with prepared sale deed and balance sale consideration, he will be ready to execute the sale deed. It is true that Exhibit A3 further states that the plaintiff shall intimate his readiness in writing, within 48 hours from the date of receipt of Exhibit A3. From the documents produced by the defendants, the date on which the plaintiff received Exhibit A3 is not clear.

14. On the other hand, from Ext.A8 it is revealed that on 23.5.2007, the plaintiff sent a telegram to the defendants and the same was received by them on 24.5.2007. It is also revealed from Exhibits A7, A10 and A11 that the plaintiff was present in the Office of the Sub Registrar, Chevayoor on 25.5.2007, with Rs.5,00,000/-. Therefore, from the above evidence adduced by the plaintiff, it can be seen that the plaintiff has substantially complied the requirements of Exhibit A3 reply notice, as demanded by the defendants.



Even then, the defendants did not turn up before the Sub Registrar's Office to receive the balance sale consideration and to execute the sale deed as promised in Exhibit A3. At that time, the plaintiff even attempted to contact the defendant over telephone, as revealed from the evidence of PW1 and from Ext.A12 receipt issued from the STD booth.

15. The evidence of DW1 that on 25.5.2007 he was not available at his residence as well as in his native place assumes significance in this context. His conduct in advising the plaintiff to reach the SRO on 25.5.2007 with the balance sale consideration and sale deed prepared in required stamp paper and thereafter not honoring the promise and keeping away from the residence in spite of receiving Ext.A8 telegram on the previous day speaks volumes. From the above conduct of the defendants it is crystal clear that they were not at all ready and willing to perform their part of the agreement. At the same time, their abortive attempt was to make it appear that they were ready and willing, and that the breach was committed by the plaintiff. But those attempts miserably failed in the light of the evidence discussed above.

16. Relying upon the pleadings in the plaint and the averments in the proof affidavit, and the evidence adduced by PW1, the learned counsel for the



appellants attempted to show that there was contradiction regarding the manner in which the plaintiff arranged the balance amount. In the proof affidavit, he stated that he has arranged a loan of Rs.5,00,000/-, while during the cross-examination he deposed that his brother agreed to advance him the required amount. During the cross examination, he also admitted that he has not arranged any loan from any bank. In the written statement as well as in the proof affidavit, the plaintiff has categorically stated that he was always ready and willing to pay the balance sale consideration and get the sale executed. Finally, as called for in Exhibit A3 reply notice, he arranged the balance amount of Rs.5,00,000/- and reached the Sub Registrar's Office after preparing the sale deed in stamp paper worth Rs.1,45,200/-. Therefore, I do not find any merits in the argument raised by the learned counsel for the appellant that the plaintiff was not always ready and willing to perform his part of the contract.

17. Relying upon the averments in the plaint, the learned counsel for the appellants would argue that time is the essence of Exhibit A1 contract. It is true that in the plaint, the plaintiff claimed that he agreed to purchase the scheduled property for the purpose of his residence and that at that time he



was residing in a rented house. He also contended that the delay in performing Exhibit A1 is causing loss to him. Though in Exhibit A3 reply notice, the defendants have taken a contention that after the expiry of three months, Exhibit A1 expired, it was not specifically stated that the defendants rescinded the contract. At the same time, in Exhibit A3 itself, another opportunity was given for executing the sale deed on 25.5.2007. Believing the above offer, the plaintiff purchased stamp paper, prepared the sale deed and reached the Sub Registrar's Office on 25.5.2007 with balance sale consideration, after informing the defendants in advance. In the above circumstances, it can be seen that by the conduct of the parties they have extended the period of contract, at least till 25.5.2007 and as such there is no merit in the argument that 3 months time mentioned in Ext.A1 is the essence of that contract.

18. Relying upon the decision of the Hon'ble Supreme Court in **Mohinder Kaur v. Sant Paul Singh [(2019) 9 SCC 358]**, the learned counsel for the appellants would argue that for the mere reason that information relating to release of the property from mortgage is not intimated, it cannot be construed that there was no readiness and willingness on the part



of the respondent. In this case, the plaintiff as PW1 admitted that mortgage was released on 12.4.2007 and as such absence of written intimation regarding release of the property from mortgage has no relevance in the facts of this case.

19. The learned counsel for the appellants would argue that in Exhibit A2 lawyer notice, the plaintiff has only expressed his willingness to pay the balance amount and readiness was not expressly mentioned. However, when the contents of Exhibit A2 are taken together, it can be seen that the plaintiff has expressed his readiness and willingness all along the period of contract.

20. Relying upon the decision of the Hon'ble Supreme Court in **Sikander L.S (D) Lrs. v. K Subramani and Ors** [2013 KHC 3930], the learned counsel would argue that without a prayer for declaration that termination of contract is illegal or that it is not binding on him, the suit for specific performance alone is not maintainable. Therefore, it was argued that, failure of the trial court to frame an issue regarding the maintainability of the suit and a decision thereon is fatal in this case.

21. In the decision in **Sikander** (supra) the Apex court has held that,



in case the agreement was terminated by the seller, in the absence of a prayer for declaration that the termination of the agreement for sale is bad in law, suit for specific performance and consequential relief of decree for permanent injunction is wholly unsustainable in law.

22. The decision in **Sikander** (supra) was distinguished by the Apex Court in **A.Kanthamani v. Nasreen Ahmed**, (2017) 4 SCC 654. Recently, in the decision in **Kandasamy R (Since Dead) & Ors. v. T.R.K. Saraswathy [(2025) 3 SCC 513]**, relied upon by the learned counsel for the respondent/plaintiff, the Apex Court has considered the decisions in **Sikander** (supra) as well as **A.Kanthamani** (supra) and held in paragraph 25 that :

*“25. What follows from A. **Kanthamani** (supra) is that unless an issue as to maintainability is framed by the Trial Court, the suit cannot be held to be not maintainable at the appellate stage only because appropriate declaratory relief has not been prayed.”*

23. Thereafter in paragraph 47, the court clarified that:

“47. However, we clarify that any failure or omission on the part of the trial court to frame an issue on maintainability of a suit touching jurisdictional fact by itself cannot trim the powers of the higher court to examine whether the jurisdictional fact did exist for grant of relief as claimed, provided no new facts were required to be pleaded and no new evidence led.”



24. Therefore, it is clear that in case the agreement was terminated by the seller, there should be a prayer for declaration that the termination of the agreement for sale is bad in law, or that it does not bind the plaintiff and in the absence of such a prayer, the suit filed for specific performance will not be maintainable.

25. In the instant case, though in Exhibit A3 reply notice, the defendants have taken a contention that after the expiry of three months, Exhibit A1 expired, it was not specifically rescinded by the defendants. In Ext.A3 it is also stated that, since Ext.A1 expired, the plaintiff is not entitled to get the relief of specific performance. At the same time, in Exhibit A3 itself, another opportunity was given for executing the sale deed on 25.5.2007. Therefore, it is to be held that, by the act of parties the period of Exhibit A1 was extended at least upto 25.5.2007. Therefore, it is to be held that, in this case Ext.A1 agreement was not terminated on 15.4.2007, as contended by the appellants. In the above factual background involved in this case, failure of the trial court to frame an issue regarding the maintainability of the suit and a decision thereon is not at all fatal.

26. At the time of arguments the learned counsel for the appellants



argued that now the value of the property has increased considerably and as such granting a decree for specific performance will give unjust enrichment to the plaintiff. In this case the sale agreement was executed on 15.1.2007. The total sale consideration was Rs.10,75,000/-. Out of which Rs.5,75,000/- was paid by the plaintiff by 27.3.2007. As I have already noted above, in this case the plaintiff was always ready and willing to perform his part of the contract and it could not be performed solely due to the default of the defendants, which ultimately resulted in the suit. There is also no delay in filing the suit. Since the breach and consequent delay was caused by the defendants themselves, they could not be allowed to take advantage of their own fault. Therefore, I find no merits in the above argument advanced by the learned counsel for the defendants.

27. On a perusal of the entire evidence on record, it can be seen that the plaintiff was always ready and willing to perform his part of the contract and the same could not be performed due to the default of the defendants alone. In the above circumstance, the trial court was perfectly justified in decreeing the suit. I do not find any irregularity or illegality in the impugned judgment and decree of the trial court so as to call for any interference and as



such this appeal is liable to be dismissed. Points answered accordingly.

28. In the result, this appeal is dismissed with costs.

All pending interlocutory applications shall stand closed.

Sd/-
C. PRATHEEP KUMAR,
JUDGE

sou.