



2023/KER/57358

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 20TH DAY OF SEPTEMBER 2023 / 29TH BHADRA, 1945

RSA NO. 186 OF 2022

AGAINST THE JUDGMENT AND DECREE DATED 19.11.2021 IN AS

32/2019 OF ADDITIONAL DISTRICT COURT-II), KOTTAYAM IN

OS 21/2014 OF PRINCIPAL SUB COURT, KOTTAYAM

CMCP 14/2022 OF HIGH COURT OF KERALA

APPELLANT IN RSA/APPELLANT IN A.S/DEFENDANT IN O.S:

M.N.SAJI, AGED 43 YEARS
S/O. NARAYANAN NAIR, RESIDING AT MUNDAMATTATHIL
HOUSE, KOTHANALLOOR KARA, KOTHANALLOOR VILLAGE,
VAIKOM TALUK, KOTTAYAM DISTRICT, PIN-686 632.

BY ADVS.
P.B.KRISHNAN
P.B.SUBRAMANYAN
SABU GEORGE
MANU VYASAN PETER

RESPONDENT IN RSA/RESPONDENT IN A.S/PLAINTIFF IN O.S:

K.R.KRISHNAKUMAR, AGED 50 YEARS
S/O. RAMAKRISHNAN NAIR, KANNATTELLUR, NATTASSERY
KARA, PERUMBAIKADU VILLAGE, KOTTAYAM TALUK,
KOTTAYAM DISTRICT, PIN - 686 006.
BY ADVS.
LUKE J CHIRAYIL
M.G.SREEJITH (K/609/2009)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 20.09.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



"C.R"

A. BADHARUDEEN, J.

=====
R.S.A.(Indigent) No.186 of 2022
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Dated this the 20th day of September, 2023

J U D G M E N T

This second appeal has been filed under Section 100 and Order XLII Rule 1 of the Code of Civil Procedure (for short, 'the C.P.C.' hereinafter) and the appellant is the defendant in O.S.No.21/2014 on the files of the Principal Sub Judge, Kottayam and the appellant in A.S.No.32/2019 on the files of the Additional District Court-II, Kottayam. The appellant impugns decree and judgment in O.S.No.21/2014, dated 7.12.2017 and decree and judgment in A.S.No.32/2019, dated 19.11.2021.

2. Heard the learned counsel for the appellant as well as the learned counsel appearing for the respondent.



3. For convenience, I shall refer the parties as ‘plaintiff’ and ‘defendant’.

4. This appeal has been admitted, raising the following substantial question of law:

1) Whether the defendant/s in a suit can succeed the case without support of pleadings in the written statement?

5. Facts of the case:

The specific case of the plaintiff before the trial court was that, on 23.1.2022, an agreement was entered into between the plaintiff and the defendant and accordingly, the defendant agreed to sell his half right in the property, having an extent of 3.55 Ares of property, for a total of Rs.14,50,000/- (Rupees Fourteen Lakh Fifty Thousand only). At the time of execution of the agreement, Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand only) was received by the defendant as advance and it was covenanted between the parties that on payment of the balance amount to the



tune of Rs.7,00,000/- (Rupees Seven Lakh only), the sale deed in respect of the plaint schedule property (half right of the defendant) would be executed in the name of the plaintiff or his nominee, by the defendant. The further case of the plaintiff is that, apart from Rs.7,50,000/- (Rupees Seven Lakh Fifty Thousand only) borrowed as advance, on 25.1.2012, the plaintiff advanced Rs.2,50,000/- (Rupees Two Lakh Fifty Thousand only) and on 31.1.2022, he also advanced Rs.1,50,000/- (Rupees One Lakh Fifty Thousand only) and thereby, the amount of advance received by the defendant, would come to Rs.11,50,000/- (Rupees Eleven Lakh Fifty Thousand only). The plaintiff would contend that, since the defendant failed to execute the sale deed as agreed, the agreement was rescinded and accordingly, the defendant is bound to pay Rs.11,50,000/- (Rupees Eleven Lakh Fifty Thousand only) along with the interest at the rate of 12% per annum.

6. The defendant filed written statement and resisted the



said claim. Paragraph Nos.3 and 4 of the written statement of the defendant, as such, are extracted hereunder:

3. The averments in paragraphs 2 and 3 of the plaint are admitted. The plaintiff is a real estate broker and the said agreement was not intended for purchase of the property by the plaintiff. The plaintiff had approached this defendant knowing that this defendant is intending to sell his undivided share in the property. Since the property was attractive plaintiff had demanded this defendant to execute an agreement for sale and he will dispose off the property to other prospective purchasers for a higher price and when such sale takes place, the plaintiff need to sign the sale deed in favour of such prospective purchasers. Thereafter the plaintiff was in search of prospective purchasers.

4. The averments in the paragraph 4 of the plaint are false and hence denied. The plaintiff was never ready and willing to purchase the property and the agreement was executed only ensuring sale of property to third persons found out by the plaintiff. After execution of the agreement, the defendant had met the plaintiff and informed that a mother and son intends to purchase the entire property, in which this defendant has undivided share, and if this defendant along



with his co-owner Thankachan K.S. sell the entire property to the plaintiff's nominee, then the sale could be completed immediately. This defendant had contacted the other co-owner and upon getting his consent for sale of the entire property, the matter was informed to the plaintiff. The prospective purchasers by name P.P.Vijayamma and Sarathchandran were the nominees of the plaintiff for purchase of the entire property. Accordingly the plaintiff had confirmed the sale of the entire property to the aforesaid purchasers for a higher price than the price agreed to this defendant. Accordingly this defendant along with his co-owner had executed sale deed No.37/2015 of Kottayam additional SRO. The said sale deed was executed in pursuance to the direction and nomination of the plaintiff. The plaintiff had received the entire sale consideration over and above the amount paid to this defendant by the plaintiff at the time of execution of the agreement. The allegations contrary to the same are false and hence denied. The contract executed between the plaintiff and the defendant has not been rescinded or in anyway canceled. The same had been acted upon by the parties which led to the execution of the sale deed. The intention of the plaintiff is to make illegal gain by misleading this Hon'ble court. The plaintiff is not entitled to realize any amount from this defendant. The execution of the aforementioned sale deed was in furtherance of the contract executed between the plaintiff



and this defendant. The plaintiff has willfully concealed this fact and is trying to make illegal gain. Neither the plaintiff nor this defendant had ever rescinded the contract as alleged. The plaintiff had approached this Hon'ble court with utmost unclean hands. The plaintiff is abusing the process of this Hon'ble court.”

7. The trial court framed appropriate issues and went on trial. During trial, PW1 examined and Exts.A1, A1(a) and A1(b) were marked on the side of the plaintiff. On the side of the defendant, DW1 to DW5 were examined and Exts.B1 to B4 were marked.

8. On appreciation of evidence and after hearing both sides, the trial court decreed the suit. On appeal, the appellate court also concurred the finding of the trial court and also ordered realisation of court fee from the appellant, since he pursued the appeal as an indigent person.

9. While arguing this case, the learned Senior counsel appearing for the appellant/defendant vehemently canvassed the



contention of the defendant and confined the same, mainly on the point that, eventhough in the written statement, defendant admitted execution of the agreement and receipt of money, he had executed sale deed in favour of Sri.K.S.Thankachan, being the nominee of the plaintiff and thereby, he performed his part of contract and in such a case, the question of returning advanced amount, does not arise. He also pointed out that, subsequent to thereafter, Sri.Roy Thomas also transferred his half right in the entire extent of 3.55 Ares, as per sale deed No.1125/2012. Ext.B1 is the sale deed executed by the defendant in favour of Sri.K.S.Thankachan and according to the defendant, the same was as directed by the plaintiff. After execution of Ext.B3, Sri.Saji (the appellant herein) and Thankachan became the co-owners of the property and during the pendency of the suit as per Ext.B4, Saji and Thankachan transferred the property in favour of DW2 V.P.Vijayamma and her son Sarathchandran. The learned counsel read out the deposition of



PW1 as well DWs 1 to 5, at length, for about two hours, to convince this Court that there were money transactions in between the plaintiff and one Rajeev, who run hotel business in Malasia and Rajeev borrowed Rs.9,00,000/- (Rupees Nine Lakh only) from the plaintiff. Heavy reliance was given to the evidence of DW2, V.P.Vijayamma and the evidence of DW3 and DW4 to support the contention that Ext.B1 was executed in the name of the nominee of the plaintiff and also to contend that Ext,B4 also was generated subsequently in tune with Exts.B1 and B2.

10. In this matter as per the written statement the contention raised by the defendant is that *the prospective purchasers by name P.P.Vijayamma and Sarathchandran were the nominees of the plaintiff for purchase of the entire property. Accordingly the plaintiff had confirmed the sale of the entire property to the aforesaid purchasers for a higher price than the price agreed to this defendant. Accordingly this defendant along with his co-*



owner had executed sale deed No.37/2015 of Kottayam additional SRO. The said sale deed was executed in pursuance to the direction and nomination of the plaintiff.

11. DW1 examined in this case is the defendant. During cross examination, when the written statement was confronted to DW1, he answered that he did not look into the written statement and it was one filed by the lawyer. At the same time, he stated that the contentions raised in the written statement are true. He also stated that the new case put up by the defendant to the effect that he had sold the property in tune with the terms of Ext.A1 in favour of K.S.Thankachan as per Ext.B1 was not stated in the written statement and he did not know the reason. During later part of cross examination, he admitted Ext.A1 agreement and he had received the amount as per Ext.A1 from the plaintiff. Thus the evidence of defendant is in deviation from his specific contention in the written statement, as herein above extracted. So it appears



that at the time of filing the written statement, the case of the defendant was that he along with his co-owner Thankachan executed sale deed in favour of Vijayamma DW2 and her son Sarathchandran as per Ext.B4 as the nominee of the plaintiff and at the time of evidence he had put up a case that in obedience to Ext.A1 agreement, he had executed Ext.B1 sale deed in the name of K.S.Thankachan. Thus the case put up by the defendant in the written statement and the case put up during the evidence are absolutely contrary.

12. Assuming that the case put up by the defendant to the effect that he had executed Ext.B1 in the name of K.S.Thankachan and Thankachan is the nominee of the plaintiff in terms of Ext.A1, (though the said contention could not be found in the written statement) is having force, then the evidence of Thankachan is very crucial. Thankachan got examined as DW5. DW5 was summoned and examined by the defendant to prove that the defendant



executed Ext.B1 sale deed in favour of DW5 as the nominee of the plaintiff. But the evidence of DW5 is that he had given Rs.15 lakh to the defendant and he purchased the property and he is not the nominee of the plaintiff. He also given evidence that he did not know Ext.A1 agreement executed between the plaintiff and the defendant (Saji and Krishnakumar). He also given evidence that later the property was transferred in favour of DW2 and her son Sarathchandran, as per Ext.B4. Thus it has to be held that the evidence of DW5 given a go-by to the case put up by the defendant that he had executed Ext.B1 in favour of DW5 as the nominee of the plaintiff and this contention not at all proved. To sum up, the said case is neither pleaded in the written statement nor proved.

13. Despite the said fact, as I have already pointed out, the learned counsel for the defendant given much emphasis to the evidence of DWs 2, 3 and 4 to contend that the defence case stands proved by their evidence. In this context, I have gone through the



evidence given by DW3 during cross examination. At the outset itself, DW3 stated that her chief affidavit was written by the lawyer and the contents of the affidavit were as instructed by the defendant. She also given evidence that she understood the case on reading the chief affidavit. Thus it appears that DW3 is the person, who did not know the contents of the chief affidavit and her knowledge regarding the transaction is by reading the chief affidavit and the contents were as instructed by the defendant. Therefore, DW3 is not at all a reliable witness. Coming to DW4, during cross examination, DW4 given evidence that she came to know about the case when she read the chief affidavit and she did not know the case in between the plaintiff and the defendant and her knowledge is hearsay. Therefore, DW4 also cannot be relied on as a witness, who is aware of the transaction in between the plaintiff and the defendant and its aftermath. Coming to DW2, DW2 is one Vijayamma V.P. During cross examination, DW2 was



asked about the details of the transaction between Rajasree, Ammini Amma, Saji and Roy. Her answer is that it was “Viswasatheeru” (a security sale) and she got knowledge regarding the same from her mother. Thus it appears that the evidence of DW2 is absolutely hearsay for which also, no credence to be given.

14. In [AIR 1953 SC 235 : AIR 1953 KHC 345], *Trojan & Co. v. Nagappa*, the Apex Court held that it is well settled that decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. It was held further that without an amendment of the plaint, the Court was not entitled to grant the relief not asked for.

15. In [AIR 1958 SC 255], *Sri Venkataramana Devaru & Ors. v. The State of Mysore and Ors.*, the Apex Court held that the object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor



just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding.

16. In [(1995) 5 SCC 612], ***Abubakar Abdul Inamdar v. Harun Abdul Inamdar***, the Supreme Court observed that if the party has not raised a plea regarding adverse possession in its pleadings, it cannot substitute the pleadings with the evidence as pleadings form the foundations of the claim of a litigating party.

17. In this connection, a decision of the Apex Court reported in [(1987) 2 SCC 555], ***Ram Sarup Gupta (dead) by LRs v. Bishun Narain Inter College and others*** is relevant, wherein it has been held that *all necessary and material facts should be pleaded by the party in support of the case set up by it. In the absence of pleadings, evidence, if any, produced by the parties cannot be considered. No party should be permitted to travel*



beyond its pleading. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings and not the form to determine the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, it would not be open to a party to raise the question of absence of pleadings in appeal. The substance of the pleading in the present case was clear. The



plaintiff went to trial knowing fully well that defendant's claim was that the licence was irrevocable."

18. Coming to the necessity of pleadings, the aim of pleadings is to offer all sides an intimation of the case of the opposite side to be met and to enable courts to work out what's really in dispute between the parties. The intent behind pleadings, be it a statement of claim, defence or reply, is of identifying the real issues between the parties, to limit the evidence of the trial subject to the issues formed and to guarantee that no party is taken at any disadvantage by the introduction of matter not certain from pleading and the trial proceeds smoothly towards judgment, upholding the principles of a fair trial. To put it otherwise, a party while entering into a trial should know in advance the crux of the case they will have to face and substantiate during the course of trial. It is in this view of this matter, relief not pleaded in a pleading should not be granted is a legally accepted proposition.



Therefore, the court cannot go beyond the scope of pleadings since pleadings are the substratum to find out the real controversy between the parties. A civil suit depends on the pleadings. Indubitably, along these lines, the pleadings play a role of assisting the court in narrowing the scope of controversy in question and make parties aware of the issue so that they can adduce the appropriate evidence to prove the same in accordance with law.

19. In [(2003) 8 SCC 740], ***Kashi Nath (Dead) through Lrs v. Jagannath***, it was held by the Apex Court that where the evidence is not in line with the pleadings and is at variance with it, the evidence cannot be looked into or be depended upon. At the point where the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot concentrate its own attention or the attention of the parties thereon claims or relief, by framing an appropriate issue/issues. The corollary is that no amount of evidence, on a plea that is not put up



in the pleadings, can be looked into to grant any relief.

20. In this connection, I am inclined to refer a latest decision of the Apex Court reported in [2023 KHC 6511 : 2023(4) KHC SN6 : 2023 KLT OnLine 1463], ***Damodhar Narayan Sawale (D) through Lrs. v. Tejrao Bajirao Mhaske***. In the said decision, the Apex Court held that one could be permitted to let in evidence only in tune with the pleadings. The observation of the Apex Court in paragraph 28 is as under:

“28. As relates issue No.9, framed by the trial court, at the risk of repetition, we will state that in regard to ‘the Fragmentation Act’ only a very vague plea was taken in the written statement by the second defendant viz., ‘In event, according to the provisions of Consolidation of Act and Prevention of Fragmentation Act, the plaintiff is not entitled to any relief.’ Thus, when the indisputable position is that no counter-claim, within the meaning of Order VIII R.6A, CPC was made by the second defendant and no averment whatsoever was made specifically in the written statement filed by him how such an issue as to whether ‘he had proved to be a marginal owner’ in the light of the ‘Fragmentation Act’ arise for consideration. This is because the well-nigh settled position of law is that one could be permitted to let in



evidence only in tune with his pleadings.

Thus it has to be held that the plaintiff/s or defendant/s in a suit would not succeed a case by adducing evidence without support of pleadings, as it is the well settled law that one could be permitted to let in evidence only in tune with the pleadings. The basic rule governing pleadings is founded on the principle of *secundum allegata et probate*, that a party is not allowed to succeed where he has not set up the case which he wants to establish.

21. Thus, the object and purpose of pleading are to enable the adversary party to know the case it has to meet. In order to have a fair trial, it is imperative that the party should state the essential material facts so that the other party may not be taken by surprise. Pleadings help the court in determining the burden of proof. The burden of proof is fixed on the basis of the contentions of the aggrieved party. If some evidence



has been produced which is not in conformation with the written statement or plaint, it may disturb the position of the whole case.

22. In the present case, as I have already pointed out, no contention was raised by the defendant in the written statement to the effect that the defendant transferred the property in the name of K.S.Thankachan, being the nominee of the plaintiff though evidence was attempted to be adduced to prove the same. But the attempt to prove the same also was miserably failed. Similarly, the contention raised in the written statement was that the defendant executed sale deed No.37/2015 in favour of V.P.Vijayamma and Sarathchandran, being the nominees of the plaintiff, also not proved and the said contention itself cannot be believed since it has been established by evidence that the defendant already sold the property to K.S.Thankachan after receiving full consideration



from him, as deposed by K.S.Thankachan as DW5.

23. To sum up, it has to be held that the concurrent verdicts entered into by the trial court as well as the appellate court do not require interference at the hands of this Court.

Hence this Second Appeal must fail.

24. Faced with the situation, the learned Senior counsel for the appellant/defendant submitted that leniency may be shown in the matter of interest as well as costs.

25. While addressing this submission, it has to be held that the normal rule is that when a party wins the case, costs shall follow. The same is a rule to be applied without exception when the claim is for realisation of money, where payment of court fee and advocate fee etc. are matters of consideration. While passing money decree, grant of interest also must be considered. Therefore, I am not inclined to reduce the interest or the costs ordered by the trial court. The



appellate court, not allowed cost to the plaintiff. Taking into consideration of the nature of contentions, I am inclined to hold that the parties in this appeal shall bear their respective costs in this appeal.

26. In the result, this Second Appeal fails and is dismissed. Resultantly, the decree and judgment impugned stand confirmed. Parties in this Second Appeal shall bear their respective costs in this appeal.

27. Since the appellant pursued this appeal as an indigent person, he is bound to pay Rs.2,15,884/- as court fee and the said amount is liable to be recovered from the appellant. Therefore, there shall be a direction to the appellant to pay the above court fee within 15 days before this Court, on failure to do so, the Registry is directed to forward a copy of the judgment and decree to the District Collector, Kottayam, for realisation of the court fee from the appellant/defendant



without fail, at any rate, within a period of three weeks from today.

Sd/-

(A. BADHARUDEEN, JUDGE)

rtr/