



FAO NO.89 OF 2024

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2025:KER:54673

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE M.A.ABDUL HAKHIM

WEDNESDAY, THE 23RD DAY OF JULY 2025 / 1ST SRAVANA, 1947

FAO NO. 89 OF 2024

AGAINST THE ORDER DATED 04.07.2024 IN I A NO.1 OF 2023 IN OS NO.138
OF 2023 OF I ADDITIONAL SUB COURT, THIRUVANANTHAPURAM

APPELLANTS/COUNTER PETITIONES 1 & 2/DEFENDANTS 1 & 2:

1 C. K. RAVI KUMAR,
AGED 71 YEARS
S/O KUTTAN, ANAND VILLA, TC 19/1417(3), MUDAVANMUGAL,
POOJAPPURA P.O, ARAMADAMURI, THIRUMALA VILLAGE,
THIRUVANANTHAPURAM, NOW RESIDING AT DHARSHANA,
VELLAMKULATHALA, THELIBHAGAM, ARAMADA P O., PUNNAKKAMUGAL,
THIRUVANANTHAPURAM., PIN - 695032

2 S. ROSE MARY,
AGED 61 YEARS
W/O K RAVI KUMAR, ANANDVIHAR, TC 19/1417(3), MUDAVANMUGAL,
POOJAPPURA P.O, ARAMADAMURI, THIRUMALA VILLAGE,
THIRUVANANTHAPURAM, NOW RESIDING AT DHARSHANA,
VELLAMKULATHALA, THELIBHAGAM, ARAMADA P O., PUNNAKKAMUGAL,
THIRUVANANTHAPURAM., PIN - 695032

BY ADVS.
SHRI.GEORGE SEBASTIAN
SRI.K.RAJENDRAN CHETTIAR

RESPONDENTS/PETITIONER&COUNTER PETITIONER No.3/PLAINTIFF&DEFENDANT NO.3:

1 JOHN FRANKLIN,
S/O ISRAEL SATHYANESAN, MALAKKAL HOUSE, KUNDAMANBHAGAM,
PEYAD, VILAPPILVILLAGE, KATTAKKADATALUK,



FAO NO.89 OF 2024

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THIRUVANANTHAPURAM., PIN - 695573

2 ANIL KUMAR,
S/O BALAKRISHNAN, KRISHNA VILASAM,
PULIYAAKONAM, PULIYARAKONAM P.O, VILAPPIL VILLAGE,
KATTAKKADATLAK, THIRUVANANTHAPURAM ., PIN - 695573

R2BY ADVS.

SHRI.ARUN V.G.
SMT.V.JAYA RAGI
SHRI.R.HARIKRISHNAN (KAMBISSERIL)
SRI.NEERAJ NARAYAN
SMT.A.S.SALMA

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
17.07.2024, THE COURT ON 22.07.2025 DELIVERED THE FOLLOWING:



C.R

JUDGMENT

1. The appellants are the defendants 1 and 2 in the suit. The 1st respondent/plaintiff filed the suit for recovery of an amount of Rs.35,62,500/- with future interest @ 6% per annum from the date of suit till realisation from the defendants and their assets charged on the plaint schedule property. The plaint schedule property is having an extent of 29.78 Ares and the residential buildings and shop rooms therein belonged to the defendant No.1. The defendants Nos.1 and 2 entered into an Agreement for sale dated 18.09.2014 with the defendant No.3 agreeing to sell the plaint schedule property @ Rs.2,15,000/- per cent within a period of three months after receiving an advance consideration of Rs.35,00,000/- from the defendant No.3. The said Agreement for sale contained an endorsement dated Nil signed by the parties to the said agreement that a new



Agreement is executed since the sale could not be completed within three months from 18.06.2014. The defendant No.3 executed an Agreement for sale dated 28.04.2016 with the plaintiff, agreeing to sell the plaint schedule property @ Rs.2,95,000/- per cent within a period of six months after receiving an advance consideration of Rs.25,00,000/- from the plaintiff. The said Agreement contains four endorsements signed by the defendant No.3 extending the period of the Agreement till 30.10.2017.

2. The contention of the plaintiff is that the defendants 1 & 2 have personally acknowledged and ratified the fact that they had duly authorised the defendant No.3 to enter into sub-agreements for sale with respect to the plaint schedule property; that since the plaint schedule property was entangled in litigation and the plaintiff believed that the plaint schedule property would be sold to him when litigation is over; that the plaintiff was always ready



and willing to perform his part of the contract; that the plaintiff came to know that the defendants are trying to sell the plaint schedule property to strangers; that even though there is no privity of contract between the plaintiff and the defendants 1 & 2, by the implication of the terms of the parent agreement for sale and the sub-agreement for sale, there is an implied and constructive contract between the plaintiff and the defendants 1 & 2; that since the plaintiff has not improperly declined to accept delivery of property by tendering the balance consideration, the plaintiff is having charge over the plaint schedule property; and that since the relief for specific performance is barred by the law of limitation, the plaintiff can only seek recovery of the advance amount along with interest and future interest.

3. Along with the suit, the plaintiff filed I.A. No.1/2023 seeking attachment before judgment of the plaint schedule property and the conditional attachment was granted. The defendant Nos.1



& 2 filed their objection to I.A. No.1/2023. The defendant No.3 did not file any objection to I.A. No.1/2023. The plaintiff filed an additional affidavit. The defendant Nos.1 & 2 filed I.A. No.4/2024 to lift the attachment before judgment. The 3rd defendant filed an objection contending that the plaintiff is entitled to attachment.

4. The Trial Court passed a common order allowing I.A. No.1/2023, ordering attachment of the plaint schedule property and dismissed I.A. No.4/2024.
5. The Trial Court did not mark any document while considering I.A.No. 1/2023. The impugned order refers to various documents produced before the Trial Court. After consideration of those documents, the Trial Court rendered the impugned order. The Appendix of the impugned order shows 'Nil'. Though the Trial Court records were called for, the records do not contain the various documents relied on by the Trial Court in the



impugned order. The procedure adopted by the Trial Court is quite unsatisfactory. Rule 42 of the Civil Rules of Practice mandates that in an interlocutory proceedings, the evidence shall be recorded and exhibits shall be marked in the same manner as in a suit and the lists of the witnesses and the exhibits shall be prepared and annexed to the order. Rule 42 is to be mandatorily followed by the Courts in the matter of recording evidence and marking documents while disposing of the Interlocutory Applications. In the absence of marking the documents and showing the same in the Appendix of the Order, the Appellate Court will not be able to understand the materials that were available before the Court while considering the Interlocutory Applications. There would not be any clarity as to the materials relied on by the Trial Court.

6. Counsel on both sides submitted that six documents were produced by the plaintiff and two documents were produced by



the Defendant No.3 before the Trial Court for consideration of I.A. No.1/2023. The 2nd respondent produced those documents in this appeal. Since the parties are not having any dispute with respect to the documents produced before the Trial Court for consideration of I.A. No.1/2023, I heard the arguments of the counsel with reference to those documents. The copies of the said documents are marked as follows for reference.

Marking	Date	Description
Ext.A1	18.09.2014	Agreement for Sale between the defendants Nos.1 & 2 and the defendant 3
Ext.A2	28.04.2016	Agreement for Sale between the plaintiff and the defendant No.3
Ext.A3	16.07.1994	Sale Deed No.2465/1994 in favour of the defendant No.1
Ext.A4	26.06.2012	Sale Deed No.316/2012 in favour of the defendant No.1
Ext.A5	29.03.2023	Lawyer Notice sent by the plaintiff to the defendants
Ext.A6	03.04.2023	Reply Lawyer Notice to Ext.A5 sent by defendant Nos.1 & 2
Ext.B1	20.07.2022	Agreement for Sale between the defendants Nos.1 & 2 and the defendant No.3
Ext.B2	19.06.2023	Agreement for Sale between the defendants Nos. 1 & 2 and the defendant No.3



7. Though notice was served on the respondent No.1/plaintiff, he did not opt to appear and contest this appeal. The respondent No.2/defendant No.3 appeared and hotly contested the appeal.
8. I heard the learned Counsel for the appellants, Sri. George Sebastian and the learned Counsel for the 2nd respondent, Sri. V.G. Arun.
9. The learned Counsel for the appellants contended that the Trial Court acted illegally in granting attachment before judgment in favour of the plaintiff. There is no privity of contract between the plaintiff and the defendants 1 & 2. The suit is barred by limitation. The plaintiff is not entitled to get charge over the plaint schedule property, as the plaintiff is not the buyer to claim charge as provided under Section 55(6)(b) of the Transfer of Property Act, 1882. The buyer can only be the defendant No.3. The defendant No.3 was not authorised to enter into any agreement for sale with any third party and to receive advance



consideration as per Ext.A1. The defendants 1 & 2 have not received any part of the consideration from the plaintiff either directly or through the defendant No.3. The only right of the plaintiff is to institute a suit against the defendant No.3 and the same is time-barred. Ext.A2 Agreement does not assign the right derived by the defendant No.3 in favour of the plaintiff. Learned Counsel concluded his arguments by submitting that the plaintiff did not make out a prima facie case to obtain attachment before judgment, and hence the impugned order is liable to be set aside.

10. *Per contra*, the learned counsel for the respondent No.2 contended that the appeal against the impugned order is not maintainable as the Trial Court granted attachment exercising its discretion with reference to the materials placed before it. Such an order could not be interfered with on appeal. Learned counsel cited the decision of the Hon'ble Supreme Court in



Seema Arshad Zaheer and Others v. Municipal Corpn. of Greater Mumbai and Others [(2006) 5 SCC 282] in which the Hon'ble Supreme Court followed its earlier decision in ***Wander Ltd. v. Antox India (P) Ltd. (1990 Supp SCC 727)*** in which it is held that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions; that an appeal against exercise of discretion is said to be an appeal on principle; that Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material and that if the discretion has been exercised by the Trial Court reasonably and in a judicial manner, the fact that the



appellate court would have taken a different view may not justify interference with the Trial Court's exercise of discretion. Learned counsel further contended that the plaintiff is a representative in interest of the defendant No.3 within the meaning of Section 15(b) of the Specific Relief Act, 1963, on the basis of Ext.A2 executed by the defendant No.3 and he is entitled to obtain specific performance from the defendant Nos.1 & 2. In such a case, the plaintiff will also come within the meaning of the buyer occurring in Section 55(6)(b) of the Transfer of Property Act, 1882. It is clear from the evidence that the sale could not take place on account of the continued litigation with respect to the plaint schedule property. The plaintiff has not improperly declined to accept delivery of the property after payment of the balance consideration. Learned Counsel cited the decision of the Hon'ble Supreme Court in ***T.M. Balakrishna Mudaliar v. M. Satyanarayana Rao and Others [(1993) 2 SCC***



740], in which it is held that the assignee falls within the meaning of representative in interest as contemplated under Clause (b) of Section 15 of the Specific Relief Act, 1963. Learned Counsel cited the decision of the Hon'ble Supreme Court in ***Shyam Singh v. Daryao Singh (Dead) by LRs. and Others [(2003) 12 SCC 160]*** to substantiate the point that under Section 15(b) of the Specific Relief Act, 1963, specific performance of the contract may be obtained by 'any party thereto' or 'their representative in interest' and that these expressions clearly include the transferees and assignees from the contracting party in whose favour the right exists. Learned Counsel cited the decision of the Hon'ble Supreme Court in ***Indira Devi v. Veena Gupta [(2023) 8 SCC 124]***, in which the Hon'ble Supreme Court followed the principle laid down in ***Shyam Singh (supra)*** that in the absence of any words or expressions in the documents indicating prohibition on assignment or transfer of right of repurchase and in the face of



clear provisions of Section 15(b) of the Specific Relief Act, 1963, an implied prohibition cannot be read into the terms of the documents. In this decision, the Hon'ble Supreme Court approved the views of the Privy Council in ***Sakalaguna Nayudu and Another v. Chinna Munuswami Nayakar [AIR 1928 PC 174]***, the Bombay High Court in ***Vishweshwar Narsabhatta Gaddada v. Durgappa Irappa Bhatkar and Another [AIR 1940 Bom 339]*** and the Madras High Court in ***Sinnakaruppa Gounder v. M. Karuppuswami Gounder and Another [AIR 1965 Mad 506]*** that the benefit of a contract of repurchase would prima facie be assignable. The counsel cited the decision of the Hon'ble Supreme Court in ***Kapilaben v. Ashok Kumar Jayantilal Sheth [(2020) 20 SCC 648]*** pointing out the principle laid down therein that the term 'representative-in-interest' under Section 15(b) of the Specific Relief Act, 1963, includes the assignee of a contractual interest; that Section 15(b) of the Specific Relief Act does not specifically state that 'obligations'



may not be assigned except with the consent of the other party; that the rule stated in Section 15(b) is that any interest in a contract can be specifically enforced by the assignee thereof, except where the 'personal quality' of the party is a material ingredient in the contract; or where the contract, expressly or by necessary implication, prohibits the beneficiary from transferring their contractual interest to third parties; that Section 15(b) does not contradict the general law on assignability of contracts as laid down, but rather clarifies that the same conditions will have to be satisfied if an assignee seeks to secure specific performance of the assigned contract.

11. The Counsel cited the decision of this Court in ***Ahammedkutty Bran v. Sukumaran [2024 (3) KHC 494]***, in which it is held that when both the seller and buyer are at fault or were not eager in the performance of the agreement, buyer is entitled for charge over the property for the sale consideration paid. The learned



Counsel concluded his arguments by praying not to interfere with the well-considered order of the Trial Court which is impugned in this appeal.

12. I have considered the rival contentions.
13. First of all, it is quite surprising to note that the Respondent No.1/Plaintiff did not come forward to contest this appeal. The Respondent No.2/Defendant No.3 is contesting this appeal to see that the order of attachment before judgment obtained by the plaintiff is confirmed. In the plaint, allegations are raised against the defendant No.3 and reliefs are claimed against him also. It is seen from the impugned order that the defendant No.3 alone filed objection to I.A. No.4/2024 filed by the defendants 1 & 2, praying to lift the attachment. The impugned order is not in favour of the defendant No.3. Extensive contentions are made by the counsel for the respondent No.2/defendant No.3 for the respondent No.1/plaintiff. It would indicate the lack of bona fides



on the part of the plaintiff. The failure on the part of the plaintiff to contest the appeal reveals that the plaintiff is not serious to see that the impugned order in his favour is sustained. The interest of the defendant No.3 is well protected by Exts.B1 and B2, the subsequent Agreements, executed with defendant Nos.1 & 2. In the absence of any contest from the part of the plaintiff who obtained the order of attachment, the defendant No.3 has no right to contest this appeal since the impugned order is not in any way beneficial to him.

14. In view of the contentions advanced before me, the only point to be decided in this appeal is whether the plaintiff is entitled to get a charge under Section 55(6)(b) of the Transfer of Property Act over the plaint schedule property for the plaint claim. It is admitted by the plaintiff himself in the plaint that the relief for specific performance is barred by the law of limitation. In such a case, the plaintiff's claim for recovery of the advance



consideration is also barred by limitation if there is no charge under Section 55(6)(b) of the Transfer of Property Act in favour of him.

15. The learned counsel for the respondent No.2 relies on Section 15(b) of the Specific Relief Act to contend that the plaintiff is a buyer within the meaning of Section 55(6)(b) of the Transfer of Property Act. Learned Counsel for the respondent No.2 claims that Ext.A2 is an assignment of the rights derived by the defendant No.3 in favour of the plaintiff and thus the plaintiff has become the representative in interest of the defendant No.3. I am unable to accept such a contention. Ext.A2 does not amount to an Assignment Deed assigning the rights derived by the defendant No.3 in favour of the plaintiff. It does not state any assignment *in praesenti*. By Ext.A2, the defendant No.3 has only agreed to assign to the plaintiff the rights that he may obtain as per Ext.A1 Agreement for a higher consideration. The



assignment is not complete. Obligations as per Ext.A1 still remain to be fulfilled. Hence, the plaintiff will not become the representative in interest of the defendant No.3. The Trial Court has misconstrued and misunderstood Ext.A2 Agreement for sale and entered a perverse finding. In such a case, this Court can perfectly interfere with the impugned order in this appeal.

16. Another contention is that the defendant No.3 is entitled to assign the rights that he derived as per Ext.A1 Agreement for sale even without the consent of the defendants 1 & 2. A Constitution Bench of the Hon'ble Supreme Court in ***Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd. [AIR 1962 SC 1810]*** has laid down the principle that an assignment of a contract might result by transfer either of the rights or of the obligations thereunder; that there is a well-recognised distinction between these two classes of assignments; that as a rule, obligations under a contract cannot be assigned except with the consent of



the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities; that on the other hand, rights under a contract are assignable unless the contract is personal in its nature or the rights are incapable of assignment either under the law or under an agreement between the parties. The question that arose in the said case was whether an obligation coupled with a benefit was assignable. Based on the above-mentioned principle, it is held that the terms of the contract strongly imply that the rights thereunder are non-transferable. In ***Indu Kakkar v. Haryana State Industrial Development Corporation Ltd. and Another [(1999) 2 SCC 37]***, the Hon'ble Supreme Court held that as a rule, a party to a contract cannot transfer his liabilities under the contract without consent of the other party; that this rule applies both at the Common Law and in Equity; that where a contract involves mutual rights and obligations, an assignee of a right cannot enforce that right



without fulfilling the correlative obligations. In *Kapilaben (supra)* also, it is held that though the provisions of the Contract Act do not particularly deal with the assignability of contracts, time and again it has been opined that a party to a contract cannot assign their obligations/liabilities without the consent of the other party; that it further has to be seen whether conferment of benefits under a contract is based upon the specific assurance that the co-extensive obligations will be performed only by the parties to the contract and no other persons and that it would be inequitable for a promisor to contract out his responsibility to a stranger if it is apparent that the promisee would not have accepted performance of the contract had it been offered by a third party. In the light of these principles, I am of the view that since Ext.A1 contains mutual rights and obligations, the rights of the defendant No.3 under Ext.A1 alone could not be transferred by Ext.A2. An Agreement for sale confers rights as



well as obligations to both parties to the Agreement. Rights and obligations arising out of an Agreement could not be transferred by one of the parties to the Agreement without the consent of the other parties.

17. The above discussion would conclude that, prima facie, the plaintiff will not attain the status of buyer under Section 55(6)(b) of the Transfer of Property Act to claim a charge over the plaint schedule property for the plaint claim. The impugned order is unsustainable and is liable to be set aside.

18. Accordingly, this appeal is allowed without costs, setting aside the impugned order and dismissing I.A. No.1/2023 in O.S.No.138/2023 on the files of the First Additional Sub Court, Thiruvananthapuram.

Sd/-

M.A.ABDUL HAKHIM

JUDGE



APPENDIX OF FAO 89/2024

RESPONDENT EXHIBITS

Document No.1	True copy of plaint in OS No.138 of 2023 on the files of Sub Court Thiruvananthapuram
Document No.2	True Copy of Attachment application I.A No.1 of 2023 in OS No.138 of 2023 on the files of Sub Court Thiruvananthapuram
Document No.3	True copy of Objection filed by the Defendants No.1 and 2 in I.A No.1 of 2023 in OS No.138 of 2023
Document No.6	True Copy of sale deed No.2465 of 1994 registered at Malayinkeezhu Sub register office
Document No.7	True Copy of sale deed No.316 of 2012executed by Sub Court Thiruvananthapuram
Document No.9	True Copy of original reply notice dated 03.04.2023 issued by Adv.R.kunjukrishnan Potti
Document No.10	Affidavit filed by the Counsel for the plaintiff in OS No.138 of 2023 on the files of Sub Court Thiruvananthapuram
Document No.4	True Copy of agreement for sale dated 28.04.2016 executed between plaintiff and defendant.
Document No.8	True Copy of office Copy of Advocate notice dated 29.03.2023
Document No.5	True Copy of agreement for sale dated 18.09.2014 defendant No.3 and defendants No.1 and 2