(2024) 09 KL CK 0081

In the High Court Of Kerala

Case No : Regular Second Appeal No. 60 Of 2017

Abdul Rahiman V.K. — APPELLANT

Vs

Sebiyulla — RESPONDENT

Date of Decision : 25-09-2024

Acts Referred:

Code of Civil Procedure, 1908 — Order 41 Rule 27
Specific Relief Act, 1963 — Section 31, 34
Evidence Act, 1872 — Section 77, 92

Citation : (2024) 09 KL CK 0081

Hon'ble Judges : C.Pratheep Kumar, J

Bench : Single Bench

Advocate : Sajan Vargheese K., Liju. M.P, K.S.Bharathan, Abel Antony

Final Decision : Dismissed

Judgement

C.Pratheep Kumar, J

1. This Second Appeal has been preferred by the respondent in A.S.182/2013 on the file of the District Court, Palakkad against the judgment and decree dated 30.7.2016 allowing the appeal and decreeing the Suit, O.S.293/2011 on the file of the Munsiff's Court, Alathur. The appellant who is the plaintiff filed the suit for a declaration that document No.2711/2011 of SRO, Vadakkanchery was executed only as security towards the chitty amount due to the defendant and that the defendant did not get any right, title or interest in respect of the property therein and also for an injunction restraining the defendant from trespassing into the plaint schedule property and from committing waste therein etc.

2. The case of the plaintiff is that he had joined in three tickets of the kuri conducted by the defendant for a total sum of Rs.1,50,000/-. He had bid the kuri and received a sum of Rs.1,00,000/- being the value of two tickets, after deducting the commission due to the defendant, on condition that he shall remit the future instalments within a period of 350 days. As security for prompt repayment of the instalments, as demanded by the defendant, and having no

other alternative, he had executed document No.2711/2011 of SRO, Vadakkanchery in favour of the defendant, on condition that he will re-convey the property on payment of the remaining instalments. In spite of the execution of the above document, the plaintiff along with his family continued to reside in the residential building situated in the plaint schedule property. He never had any intention to convey the schedule property in favour of the defendant. Though he was entitled to get the amount covered by the third ticket also, it was not paid by the defendant. Therefore, the plaintiff requested the defendant to adjust the amount due to him on the basis of the third ticket, in future instalments. However, the defendant insisted the plaintiff to repay future instalments and in that respect there was wordly altercation between them. Thereafter, the defendant threatened the plaintiff to alienate the plaint schedule property and it was in the above context that he filed the present suit. The defendant would contend that the execution of document No.2711/2011 has nothing to do with the chitty conducted by him. According to him, the above document was executed by the plaintiff after receiving due consideration and therefore he prayed for dismissing the suit.

3. The trial court framed necessary issues. The evidence in the case consists of oral testimony of the plaintiff as PW1 and Exts.A1 to A3 on the side of the plaintiff. On the side of the defendant, the defendant was examined as DW1 and Exts.B1 to B6 marked. Exts.C1 and C1(a) were marked as court exhibits. After appreciating the available evidence, the trial court dismissed the suit. However, the 1st appellate court reversed the finding of the trial court and decreed the suit. It was in the above context, the plaintiff approached this Court by filing this Second Appeal raising various contentions.

4. At the time of admission, this Court has formulated a substantial question of law. However, after hearing both sides at length, this court found it necessary to re-formulate the substantial questions of law as follows :-

(i) Whether the absence of a prayer for setting aside Ext.A2(B1) sale deed is fatal to the plaintiff's case ?

(ii) Whether the finding of the First Appellate Court that Ext.A2(B1) is a sham document is justified, in the light of the evidence on record ?

5. Thereafter, both sides were again heard in detail on those questions of law. One of the contentions raised by the appellant/defendant is that absence of a prayer for setting aside the sale deed No.2711/2011 is fatal to the plaintiff's case. Relying upon Section 31 of the Specific Relief Act, the learned counsel would argue that in the light of the pleadings in the plaint, the prayer for setting aside the above sale deed was absolutely necessary. On the other hand, the learned counsel for the respondent/plaintiff would argue that the prayer for declaration sought for in the plaint is sufficient in the light of the contentions raised in the plaint.

6. Section 31 of the Specific Relief Act reads as follows :-

When cancellation may be ordered

(1) . Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

(2). If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

7. Section 34 of the Specific Relief Act reads thus :-

Discretion of court as to declaration of status or right

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

8. The specific case of the plaintiff is that he had executed document No.2711/2011 which was marked as Ext.A2 (B1) as security for the prompt repayment of the chitty amount due to the defendant and it was never intended to be acted upon. Further, according to him, at the time of executing Ext.A2 document, the parties never intended to convey the plaint schedule property in favour of the defendant and no consideration was received towards price of the plaint schedule property. The learned counsel for the plaintiff would argue that Section 31 of the Specific Relief Act would apply only with respect to a written statement which is void or voidable, which is not applicable in the present case. According to him, Section 34 is wide enough to cover any right as to any property against any person denying or interested to deny his title to such right.

9. In the decision in Ningawwa v. Byrappa Shiddappa Hireknrabar and Others [AIR 1968 SC 956], in paragraph 5, the Apex Court held that:

“The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document out as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable.”

10. In this case, the plaintiff has no case that in the execution of Ext.A2 document there was any fraudulent misrepresentation as to the contents of the document or as to its character. In the light of the pleadings in the plaint, it can

be seen that the plaintiff has no case that Ext.A2 document is either void or voidable. On the other hand, according to him, he happened to execute it as security for prompt repayment of the chitty amount covered by two tickets in the chitty conducted by the defendant and bid by him and the understanding was to re-convey the property on repayment of the entire future instalments. His case is that it is a sham document, not intended to be acted upon. In the light of the above pleadings in the plaint, it is to be held that absence of prayer for cancellation of Ext.A2 is not fatal to the plaintiff's case, as there is a prayer for declaration that the said document is executed only as security for the chitty amount.

11. As argued by the learned counsel for the defendant, a registered document carries with it a presumption that it is a genuine and validly executed one. In the decision in Bhasy v. Thoman [2022 (4) KLT 624], relied upon by the learned counsel for the appellant, a Single Judge of this Court relied upon the decision of the Hon'ble Supreme Court in Vimal Chand Ghevarchand Jain and Others v. Ramakant Eknath Jadoo [(2009) 5 SCC 713], in which the Apex Court held that, "a registered sale deed carries a 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."

12. In the decision in Prem Singh and Others v. Birbal [2006 (5) SCC 353], the Apex Court held that the burden is on the person who challenges the validity of a registered document. In paragraph 27 the court held thus:

"27.There is a presumption that a registered document is validly executed. A 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."

13. At the time of evidence, the defendant would admit that he has been conducting chitty and also that the plaintiff had joined in the said chitty. According to him, the plaintiff had joined only in two tickets and not in three, as claimed by him. He would also admit that the plaintiff has bid those two tickets and the chitty amount was also disbursed to the plaintiff after deducting his commission. Further, according to the defendant, there is no registration for the chitty and also that he never used to insist for any security for repayment of future instalments, as it was only a friendly chitty conducted on mutual respect.

14. In the written statement, the contention taken by the defendant is to the effect that at the time of executing Exhibit A2 document, no amount was due from the plaintiff to the defendant. In paragraph 4 of the written statement, the defendant specifically contended that there was no arrears of Kuri subscription payable by the plaintiff. However, at the time of evidence, the defendant admitted that out of the total 30 subscribers, everybody except the plaintiff had repaid the entire instalments. Therefore, the contention taken by the defendant that at the time of executing Exhibit A2, no amount was due to him from the plaintiff, appears to be not correct. Further, the contention taken by the

defendant that when he advanced the bid amount to the subscribers of the chitty he never used to obtain security from them, cannot be believed without a pinch of salt.

15. Exhibit A2 document (Exhibit B1) was executed on 19.8.2011. Exhibit B2 (Exhibit A1) is the title deed of the plaintiff namely, the assignment deed No.1249/11 dated 11.4.2011. It shows that the plaintiff executed Exhibit A2 in favour of the defendant just four months and one week after he purchased the said property. In spite of the fact that the plaintiff executed Exhibit A2 in the form of a sale deed in favour of the defendant, the plaintiff along with his family continued to be in possession of the plaint schedule property and continued to occupy the residential building therein. However, the claim with regard to the continued possession of the plaintiff over the plaint schedule property, was disputed by the defendant.

16. In Exhibit C1 Commission Report, the Commissioner reported that when he visited the schedule property, it was found that the plaintiff and his family were residing in the residential building therein. In order to get over the situation, the defendant has taken a contention that on 20.8.2011, the day next to the execution of Exhibit A2, he had rented out the residential building in the plaint schedule property in favour of Sulaiman, the brother of the plaintiff on a monthly rent of Rs.1,000/-. He would further contend that the brother of plaintiff might have permitted the plaintiff to reside in the building in the plaint schedule property. In paragraph 10 of the written statement, the defendant contended that the household items noticed by the Commissioner in Exhibit C1 report belongs to the plaintiff's brother Sulaiman. He would also claim that a rent deed was executed between himself and Sulaiman on 20.8.2011.

17. Exhibit B7 is a rent deed dated 20.8.2011 allegedly executed between the defendant and one Sulaiman, as per which the defendant rented out the residential building in the plaint schedule property to Sulaiman for a monthly rent of Rs.1,000/-. The plaintiff seriously disputed the genuineness of Exhibit B7. Even then, the defendant has not examined the above Sulaiman or any other witness to prove the due execution of Exhibit B7.

18. In order to disprove the above contention raised by the defendant, the plaintiff has filed I.A. No.2 of 2024 before this court under Order XLI Rule 27 CPC and produced two documents and prayed for accepting those documents in evidence. No written objection was filed by the defendant to I.A. No.2/2024. The documents produced along with the above I.A. are certified copy of plaint in O.S No.354 of 2019 on the file of Munsiff's Court, Alathur as well as certified copy of the written statement filed by the defendants in that suit. The above suit is seen filed by the appellant herein against the respondent and his wife for recovery of possession of the plaint schedule property. In the above suit, the defendant herein contended that he had purchased the plaint schedule property therein from the plaintiff herein, that he had permitted the plaintiff herein and his wife to occupy the house situated in the plaint schedule property for a period of three

months, that they failed to vacate the plaint schedule house and filed the present suit O.S. 293 of 2011 for canacellation of the document executed in his favour etc. In the above suit, the defendant has no case that he had rented out the residential building in the plaint schedule property to Sulaiman, but his case is that even after execution of Exhibit A2, he permitted the plaintiff herein to continue to occupy the residential building therein.

19. Therefore, as argued by the learned counsel for the plaintiff, the contention taken by the defendant in the present suit as well as in O.S. 354 of 2019 are contradictory to each other. Since the above suit is also between the same parties and in respect of the very same subject matter, those documents are relevant for a just decision of this appeal. The above suit was filed in the year 2019, after he filed this Second Appeal. Therefore, these documents could not have been produced in the present suit or even along with this second appeal. In the above circumstances, I.A. No.2 of 2024 is liable to be allowed and the additional documents produced are liable to be marked. In the result, I.A. No.2 of 2024 is allowed and the above two documents are marked as Exhibits A4 and A5 respectively.

20. As I have already noted above, in Exhibit A4 suit filed by the defendant against the plaintiff for eviction, there is no mention about Exhibit B7. In the above suit, the defendant herein has no case that Sulaiman is the tenant in the plaint schedule property. On the other hand, in that suit his case is that in spite of the execution of Ext.A2, the plaintiff was permitted to reside therein for a period of 3 months. The above stand taken by the defendant in Ext.A4 suit probabilises the plaintiff's case further. Non-mentioning about Exhibit B7 in Exhibit A4 suit also improbabilises the defence case and probabilises the plaintiff's case that Exhibit A2 is a sham document. Further, Exhibit A4 and A5 probabilises the plaintiff's case that in spite of execution of Exhibit A2, he continued to occupy the schedule property including the residential building situated therein.

21. It was argued by the learned counsel for the plaintiff that failure of the defendant to produce the original of the prior document is to be viewed with suspicion. In this case, both sides have not produced the original of the prior deed Exhibit A1 (Exhibit B2), whereas both sides produced its certified copy.

22. In the decision in Appaiya v. Andimuthu [2023 KLT OnLine 1797 SC], relied upon by the learned counsel for the defendant, the Apex Court held that, since Section 77 of the Evidence Act provides for production of certified copy of a public document as secondary evidence in proof of contents of its original, non-production of the original is not fatal.

23. In Exhibit A2, it is specifically stated that prior deed is also handed over to the defendant along with Exhibit A1. According to learned counsel, the original was produced before the Bank for availing loan and that is why the certified copy alone was produced in this case. The plaintiff has no case that the original of

Ext.A1 is in his possession. Therefore, the contention of the defendant that the original document is produced in bank could not be disbelieved. Since Ext. A2 is a registered document and the law permits production of its certified copy to prove its contents, the non-production of the original, in the facts of this case, is not fatal.

24. It is true that after obtaining Ext.A2, the defendant has effected mutation in his favour. However, the law is well settled that entry in revenue records will not confer title in immovable property and as such mutation effected by the defendant in his favour is of no consequences, in determining the dispute involved in this case.

25. Relying upon the decision of a Single Judge of this Court in Moosa v. Moideen [2001 KHC 72], it was argued that there is a presumption regarding the validity and genuineness of registered documents. In the above case, the learned Single Judge further held that, when the plaintiff contends that a document was executed as security for a loan, there should be a prayer for re-conveyance of the property.

26. In the decision in State Bank of India, Asset Recovery Management Branch, Ernakulam v. Niyas and another, 2021 (2) KHC 18, a Division Bench of this Court also held that in such cases, the remedy of the aggrieved party is to sue for re-conveyance of the property.

27. However, relying upon an earlier Division Bench decision of this Court in George and Another v. Annakutty and Others, 2017 (4) KHC 742, the learned counsel for the plaintiff would argue that a suit for declaration is maintainable. In the decision in George and Another (supra), the plaintiff filed a suit for declaration that the document executed was a sham document and not intended to be acted upon. After relying upon various decisions of the Apex Court, in paragraph 13, the Division Bench held that:

13. Therefore, as held by the Apex Court, a party is entitled to show that the transaction as recorded in the document was never intended to be acted upon and that the document is a sham one. In the case at hand also, the vendors do not rely upon Ext A1 and attempt to vary its terms, but it is the contention that Ext A1 was never intended to be acted upon. According to the vendors the real transaction between the parties was some other agreement not recorded in the document. In Hathika v Padmanabhan (1994 [1] KLT 345) a learned Single Judge of this Court held that the bar of Section 92 of the Evidence Act applies when a party seeks to rely upon the document embodying the terms of the transaction and that the bar is not applicable when it is the case of the party that the transaction recorded in the document was never intended to be acted upon and that the document is a sham one. We do not think that it is necessary to multiply authorities. It is open to a party to contend that a document executed by him purporting to be a sale deed is only a fictitious or a nominal transaction and that it was never intended to be acted upon and that the transaction between the

parties was an entirely different one."

28. In the decision in Thankachan v. V. Gireesh Kumar, 2022 (1) KHC 521, another Division Bench of this Court reiterated the decision in George (supra) and held that oral evidence can be permitted to be adduced in support of the contention that a document executed is a sham document and that by virtue of that document, the respondent does not acquire any right or title over the disputed property.

29. In Ramlal and Others v. Phagua and others, AIR 2006 SC 623, plaintiff filed a suit for declaration that the sale deed executed by her was only a nominal sale and she continues to be the owner of the suit land. Though the trial court and the First Appellate Court dismissed the suit, the High Court decreed the same and it was confirmed by the Hon'ble Supreme Court. In Gangabai v. Chhabubai, AIR 1982 SC 20, also a suit for declaration to declare a sale deed executed by the plaintiff as a sham document, was held maintainable. In the light of the above decisions of the Hon'ble Supreme Court and the decisions of the Division Benches of this court in George (supra) and Thankachan (supra), if the plaintiff could prove that Ext.A2 document is a sham one and that by virtue of that document no title passed on to the defendant, the prayer for declaration is enough and there is no necessity for a prayer for re-conveyance.

30. The sale consideration shown in Exhibit A2 is Rs.1,10,000/-. At the time of evidence, the defendant has taken a contention that he had in fact paid a total consideration of Rs.6,75,000/-. However, he has not offered any explanation for showing a much lesser consideration in Exhibit A2, if he had actually paid Rs.6,75,000/-, as claimed. At the same time, the defendant is claiming title over the plaint schedule property solely based on Ext.A2 (Ext.B1), a registered document. In the above circumstance, he could not be heard to say anything against its contents, in the light of the bar under S.92 of the Evidence Act. Moreover, he could not adduce any evidence against the contents of Ext.A2 including that he had paid Rs.6,75,000/- to the plaintiff, as claimed in the written statement. Further, no effort was made to prove the above claim. Since in Exhibit A2, the consideration shown is Rs.1,10,000/- and the defendant could not prove the contention taken in the written statement that he has paid a consideration of Rs.6,75,000/-, the above circumstance only improbablises the defendant's case and probablisies the plaintiff's case that Exhibit A2 is a sham document.

31. In the light of the above discussions, it can be seen that the trial court as well as the First Appellate Court were perfectly justified in decreeing the suit. There is absolutely no reason to hold that the findings of the trial court as well as the First Appellate Court are not in tune with the evidence available on record, much less, perverse. I do not find any valid grounds to interfere with the concurrent findings of the trial court as well as the First Appellate Court, so as to call for any interference. Therefore, this Regular Second Appeal is liable to be dismissed. Points 1 and 2 answered accordingly.

In the result, this Regular Second Appeal is dismissed. Considering the facts, I order no costs.