
(2014) 07 KL CK 0108
In the High Court Of Kerala
Case No : O.P. (C) No. 1024 of 2011

ETL Corporate Services Pvt. Ltd.

APPELLANT

Vs

Sarojini

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 1 Rule 5

Citation : (2014) 4 ILR 106 : (2014) 3 KHC 549 : (2014) 3 KLJ 734

Hon'ble Judges : K. Harilal, J

Bench : Single Bench

Advocate : G. Shrikumar, M.M. Jasmin, Nidhi Sam John and A.V. Thomas, Sr. Adv, Advocate for the Appellant; T. Krishnan Unni, Sr. Advocate and K.N. Chandrababu, Advocate for the Respondent

Judgement

K. Harilal, J.—The petitioners are the defendants 1 and 3 in O.S. No. 13/09 on the files of the 1st Additional Sub Court, Ernakulam, and the respondents herein are the plaintiffs. The suit is filed for declaration and consequential prohibitory injunction. According to the averments in the plaint, one Sebastian approached the late Sri. Madhavan, the predecessor-in-interest of the plaintiffs, for purchase of the properties having an extent of 47.95 Ares belonging to him and the 1st respondent/1st plaintiff offering Rs. 30,000/- per cent. Thereafter, the said Sebastian took the late Sri. Madhavan and the 1st plaintiff to the Sub Registrar's Office, Thrikkakara, and got two documents executed in favour of the petitioners/defendants under the guise of registering sale agreements in respect of sale of 1.30.700 Acres of land belonging to plaintiff No. 1 and the deceased Madhavan. Subsequently, they came to know that one of such documents is a registered Power of Attorney. The said registered Power of Attorney is vitiated by fraud and misrepresentation and the defendants will not get any right over the property under the said registered Power of Attorney. Hence prayed for declaration that the Power of Attorney executed by the deceased Madhavan in favour of the defendants is a fraudulently created and invalid one and also for a prohibitory

injunction restraining the defendants from transferring the property under the said Power of Attorney or taking possession of the same or executing any document binding on the plaintiffs.

2. The defendants filed a written statement contending that the said Power of Attorney is a valid one and it was executed after receiving full consideration of the sale, from one K.P. Varghese to whom the defendants entrusted the deal with the plaintiffs in the matter of sale. The Power of Attorney was executed in continuation of the agreement with K.P. Varghese and the entire consideration of the sale was given to the plaintiffs through the account of K.P. Varghese. Hence his presence in the suit is necessary for the proper and effective adjudication of the question in controversy involved in the suit. But he has been purposely omitted from the party array with mala fides so as to suppress the material facts which would defeat the case set up by the plaintiffs. On the basis of the plea of non joinder of necessary parties, the Court below raised a preliminary issue, whether the suit is bad for non joinder of necessary parties and heard both parties. After hearing both parties, the Court below found that the suit is not bad for non joinder of necessary parties and the issue is thereby answered in favour of the plaintiffs. Feeling aggrieved, this original petition is filed challenging the legality and propriety of the findings under which the Court below held that the suit is not bad for non joinder of necessary parties.

3. Firstly, Sri. Krishnan Unni, the learned senior counsel for the plaintiffs/respondents contended that K.P. Varghese is not a necessary party as no relief has been sought for against K.P. Varghese in the original suit. According to the learned senior counsel, the party against whom the relief sought for alone is a necessary party and no other person can be deemed to be a necessary party in the suit. Since no relief has been sought for against K.P. Varghese, he shall never be a necessary party in the original suit.

4. I am unable to countenance the said argument in view of Order 1 Rules 5 and 10 of the Code of Civil Procedure. Order 1 Rule 5 says that, it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him. Therefore, the reliefs sought for alone cannot be taken as basis for determining necessary parties. According to Order 1 Rule 10(2), the Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. The last limb of the above Rule emphasises that any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added, as parties either as plaintiff or as defendant. If that be so, necessary

party means and includes not only the person against whom relief is sought for; but also the person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the suit. No relief need be sought against such person.

5. Secondly, the learned counsel contended that examination of Sri. K.P. Varghese as a witness is sufficient in lieu of making him a party to the suit and his evidence, as a witness, is sufficient for effective and complete adjudication of the question in controversy involved in the suit.

6. Can the examination of a person as witness be a substitute in lieu of making him a party to the suit? What is the difference between the role of a witness and the role of a party to the suit in the adjudication process of a suit? What is the purpose of making a person party to the suit? The evidence produced by the parties cannot be considered in the absence of pleadings and the parties are not permitted to travel beyond the pleadings and that all the material facts must be pleaded in support of the case set up. The object and purpose of pleading are to enable the adversary party to know the case that he has to meet. The parties have to adduce evidence on the basis of issues and issues arise when a material proposition of fact or law is affirmed by one party and denied by the other party. In short, issues arise from pleadings only. The parties to the suit alone can make pleadings in the suit and the witness cannot plead; but he can give evidence on the pleadings of the parties to the suit only. If that be so, to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit as provided in Order I Rule 10(2) of the CPC, proper issues arose from material facts pleaded by the parties to the suit are required. It will be possible only if the person transacted with the fact in issue is made a party to the suit. This purpose cannot be served by making him a witness as he can let in evidence on facts pleaded by parties to the suit only and evidence without pleadings goes without value. Thus, the evidence given by the witness can never be a substitute in lieu of the evidence of a party to the suit based on his pleadings. Needless to say, examination of a person as witness can never be a substitute in lieu of making him a party to the suit. A person, who closely transacted with the material facts and capable to plead as to the fact in issue is also a necessary party for the effective and complete adjudication of the question involved in the suit notwithstanding whether any relief is sought against him or not. The person against whom the relief sought for alone is not the necessary party.

7. Let us consider the question whether the presence of K.P. Varghese is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the present suit.

8. Going by the plaint, it could be seen that nowhere in the plaint has the plaintiffs made a reference as to the presence of K.P. Varghese in the land transaction between the plaintiffs and the defendants. But in the written statement, as I referred above, the specific contention is that, late Madhavan, the predecessor of the plaintiffs approached K.P. Varghese and made an offer to

sell his property and his wife's property and an agreement for sale with respect to the plaint schedule property was executed in favour of K.P. Varghese, for and on behalf of the defendant company, at the instruction of the defendants and, subsequently, in continuation of the said agreement dated 8-8-2006, Sri. Madhavan executed another agreement dated 9-2-2007 in favour of the first defendant whereby the plaint schedule property was put in the possession of the first defendant. In short, the agreement for sale was effected through an intermediary by name K.P. Varghese and the entire sale consideration had been given to the deceased Madhavan through the account of K.P. Varghese and Madhavan, in turn, has executed a stamped receipt in favour of the first defendant through K.P. Varghese on 10-2-2007, on the date of registration of the Power of Attorney, and finally the deceased Madhavan executed the Power of Attorney, after receiving full consideration of the sale from K.P. Varghese, with whom the entire transaction was effected. It is pertinent to note that the case of the plaintiffs is that the defendants under the guise of registering a sale agreement in respect of the property belonging to plaintiff No. 1 and the deceased Madhavan, fraudulently registered an irrevocable Power of Attorney in favour of the defendants. The role of K.P. Varghese in the above transaction is significant and determinative and his presence in the suit is necessary for arriving at an effective decision on the genuineness of the Power of Attorney in dispute. In the instance case, the crucial issue to be framed is whether the irrevocable Power of Attorney in favour of the defendants had been executed after receiving the entire sale consideration. For an effective adjudication of this issue, the person who had given the sale consideration and transacted with the deceased Madhavan for effecting the sale is a necessary party as his explanation by way of pleading is required for the effective adjudication of the matter in issue. Hence I find that the presence of K.P. Varghese is necessary for the proper and effective adjudication of the question in controversy involved in the suit.

9. But the Court below went wrong by the finding that by the execution of the subsequent agreement, the agreement alleged to have been executed between K.P. Varghese and late Madhavan, loses its significance and, therefore, the presence of K.P. Varghese before the Court is not necessary to enable the Court effectually and completely to adjudicate upon and settle all issues involved in the suit. The Court below miserably failed to conceive the actual fact in issue involved in the suit. Consequently, the impugned order under challenge is set aside. At present, the suit is bad for non joinder of necessary parties. The plaintiffs are allowed to take steps to implead necessary parties within a period of one month from the date of receipt of a copy of this judgment and the Court below shall proceed in accordance with law. This Original Petition is allowed accordingly.