
(2012) 06 KL CK 0235

In the High Court Of Kerala

Case No : Regular Second Appeal No. 1139 of 2010

Kamalakshi Amma

APPELLANT

Vs

Sangeetha and another

RESPONDENT

Date of Decision : 06-06-2012

Acts Referred:

Specific Relief Act, 1963 — Section 31, 39

Citation : (2012) 3 ILR (Ker) 45 : (2012) 3 KLJ 30

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : K. Ramachandran and Sri S. Sreedev, for the Appellant; S.V. Balakrishna Iyer , Sri P.B. Krishnan, Smt. Geetha P. Menon, Sri P.M. Neelakandan and Sri P.B. Subramanyan, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Justice Thomas P. Joseph

1. Heard. Admit The following substantial questions of law are framed:

(i) Could a person who is neither the executant of the deed nor bound under any circumstance by the executant request to deliver up and cancel the deed?

(ii) Were the courts below justified in overlooking the fact that even as per the admitted partition deed, appellant is entitled to get more than 9 cents and also 2/3rd of the excess land?

2. Respondents 1 and 2 appear through counsel.

3. Since I have perused a copy of Ext.A-1, partition deed No. 1122 of 1959 dated 7-4-1959 based on which parties hereto claim right, title, interest and possession, in view of the substantial questions framed for a decision and as agreed by the learned counsel on both sides, it is not necessary to call for entire records of the case.

4. According to the appellant/plaintiff, plaint A schedule belongs to her exclusively as per Ext.A-1, partition deed. Plaint B schedule was allotted to her sister, the late Lakshmikutty Amma in the said partition. The 3rd respondent is the sole legal heir of the said Lakshmikutty Amma. The 2nd respondent is the son of appellant. 1st respondent is the wife of 2nd respondent. Appellant claims that she was in possession of plaint A and B schedule items notwithstanding the partition as per Ext.A-1. She constructed building in the said property about 42 years back. The building overlaps into plaint B schedule. According to the appellant, the 3rd respondent has no right over the building. While so, the 2nd respondent executed Ext.B-1, assignment deed No. 6402 of 2005 in favour of the 1st respondent in respect of 7.808 cents and building on the strength of a registered power of attorney (Ext.A-5 is its certified copy) executed by the 3rd respondent. According to the appellant, entitlement of the 3rd respondent as legal heir of deceased Lakshmikutty Amma as per Ext.A-1 is only 4.500 cents. Appellant apprehended that Ext.B-1, assignment deed would affect her right, title and interest in the suit property and hence requested that the said assignment deed be cancelled. She also prayed for a decree for prohibitory injunction.

5. The 3rd respondent, supporting the appellant contended that she is the owner in possession of 4.500 cents. She claimed that the building in the suit property was constructed by the appellant. The 2nd respondent was not authorised to execute assignment deed in respect of anything more than 4.500 cents. She is not aware that the 2nd respondent has executed assignment deed in respect of 7.808 cents in favour of the 1st respondent.

6. Respondents 1 and 2 contended that entitlement of the appellant as per Ext.A-1, partition deed is only for 9 cents and that she has no right for any excess land. They denied that the entire property was in the possession and enjoyment of the appellant or that she constructed the building. The building was constructed by the 2nd respondent, his father and the late Lakshmikutty Amma. The 3rd respondent was the owner in possession of 7.808 cents after the death of Lakshmikutty Amma. The said 7.808 cents and building was assigned to the 1st respondent by the 2nd respondent on the strength of Ext.A-5, power of attorney. That assignment deed is valid. Appellant is not entitled to get the said deed cancelled or injunction as prayed for.

7. The trial court found against the plea of the appellant that she was in possession of the entire property and constructed the building. It was of the view that Ext.B-1, assignment deed executed by the 2nd respondent in favour of the 1st respondent as power of attorney holder of the 3rd respondent cannot be cancelled as that document is neither void nor voidable against the appellant. Trial court dismissed the suit. First appellate court has concurred with the said view and dismissed the appeal. Hence this Second Appeal.

8. The learned counsel for appellant has contended that it is admitted by both sides that there is excess land in Sy. No. 405/12 than the 13.500 cents which was partitioned among the appellant and the late Lakshmikutty Amma as per

Ext.A-1 and hence having regard to the proportionate extent allotted to the appellant and the late Lakshmikutty Amma as per Ext.A-1, there must be a proportionate division of the excess land in which case, 2/3rd of the excess land should go to the appellant and the entitlement of the 3rd respondent as legal heir of Lakshmikutty Amma is only the remaining 1/3rd of the excess land. Alternatively, it is argued that at any rate, the excess land is liable to be partitioned among the appellant and the 3rd respondent equally in which case also, 3rd respondent is not entitled to get 7.808 cents. As Ext.B-1, assignment deed is for more than what the 3rd respondent is entitled, the said deed is liable to be cancelled as it affected the right, title and interest of the appellant regarding the 11.600 cents.

9. Learned Senior Advocate for respondents 1 and 2 has contended that appellant is not entitled to get Ext.B-1, assignment deed cancelled. u/s 31 of the Specific Relief Act, 1963 (for short, "the Act") a deed can be cancelled only if it is void or voidable as against the party seeking that relief. It is contended that appellant is not a party to Ext.B-1, nor is she bound by the person who has executed it. It is also argued that even as per the contention of the appellant, 3rd respondent is entitled to get 4.500 cents and a portion of the excess land and hence to that extent at least, Ext.B-1 is valid. Hence also Ext.B-1 is not liable to be cancelled. It is argued that appellant has no right over the 7.808 cents and building assigned as per Ext.B-1.

10. So far as the claim of the appellant that she constructed the building in the suit property and that she was in possession of plaint A and B schedules are concerned, courts below held that the properties were partitioned as per Ext.A-1 and hence the claim of the appellant that she was in possession of the entire property even after Ext.A-1 cannot be accepted. Courts below also found against the claim of the appellant that she constructed the building. The above findings are based on a proper appreciation of the evidence and involve no substantial question of law.

11. The question is whether Ext.B-1, assignment deed could be cancelled in the circumstances pleaded by the appellant? It is admitted that as per Ext.A-1, the property comprised in Sy. No. 405/12 was partitioned among the appellant and her sister, Lakshmikutty Amma. Appellant was allotted 9 cents and excess while Lakshmikutty Amma was allotted 4.500 cents and excess. Exhibit B-1, assignment deed is executed by the 2nd respondent (son of the appellant) as power of attorney of the 3rd respondent (the sole legal heir of Lakshmikutty Amma) and in favour of the 1st respondent as regards 7.808 cents and the building.

12. Section 31 of the Act (corresponding to Sec. 39 of the Specific Relief Act, 1877--for short, "the old Act") states:

31. 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) * * * *

It is clear from sub-sec.(1) of Sec. 31 of the Act that to enable the appellant get Ext.B-1 cancelled, it must be shown that the said instrument is void or voidable as against her and the appellant has a reasonable apprehension that if Ext.B-1 is left outstanding, it may cause her serious injury.

13. It is said that most part of Sec.39 of the old Act (corresponding to Sec. 31 of the Act) was borrowed from Articles 1906 and 1908 of the Draft New York Civil Code. The provision for cancellation of a written instrument is based upon the administration of protective justice for fear that the instrument may be vexatiously or injuriously used by one against another when the evidence to challenge such written instrument may be lost or that it may throw a cloud or suspicion over his title or interest.

14. Story, in Equity Jurisprudence (English Edition), 1920 in Article 694 states:

In the first place, then, let us consider in which cases, court will direct the delivery up, cancellation or rescission of agreements, securities, deeds or other instruments. It is obvious that the jurisdiction exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. If, therefore, the instrument was void for matter apparent upon the face of it, there was no call to exercise the jurisdiction, with the possible exception of instruments forming a cloud upon the title to land. The party is relieved upon the principle, as it is technically called *quia timet*: that is, for fear that such agreement, securities, deeds, or other instruments may be vexatiously or injuriously used against him when the evidence to impeach them may be lost; or that they may now throw a cloud or suspicion over his title or interest.

15. Referring to Chapter V of the Old Act, Whitely Stoks states in Anglo-Indian Code (Vol. 1) at page 934:

Chapter V declares that any person against whom a written instrument is void or voidable, who has reasonable apprehension that if left outstanding it may cause him serious injury, may obtain an adjudication that it is void or voidable and an order that it be delivered up and cancelled. The relief extends to a forged instrument, and also to one originally valid but which has subsequently forged. The Chapter applies to cases not unfrequent in India, where a party gets possession of document on which he might not indeed be able to found a claim in a court of justice but which might give him such *prima facie* right against the other as would expose him to vexatious demands and litigation.

16. The Bombay High Court, in *Jeka Dula v. Bai Jivi and others* AIR 1938 Bombay 37 laid down the following three conditions for the application of Sec.39 of the old Act (Sec. 31 of the Act):

- (i) The written instrument is either void or voidable as against the plaintiff.
- (ii) The plaintiff may reasonably apprehend serious injury from the instrument being left outstanding.
- (iii) In view of all the circumstances of the case the court considers it reasonable and proper to administer the protective and preventive justice asked for.

17. A Full Bench of the Madras High Court considered the scope of Sec. 39 of the old Act (Sec. 31 of the Act) in *Muppudathi Pillai v. Krishnaswami Pillai* AIR 1960 Madras 1 and held at page 4 as under:

It stands to reason that the executant of the document should be either the plaintiff or a person who can in certain circumstances bind him. It is only then it could be said that the instrument is voidable by or void against him. The second aspect of the matter emphasises that principle. For there can be no apprehension if a mere third party, asserting a hostile title creates a document. Thus relief under Sec. 39 would be granted only in respect of an instrument likely to affect the title of the plaintiff and not of an instrument executed by a stranger to that title.

The Full Bench illustrated that when a trespasser purports to convey the property in his own right and not in the right of the owners, the remedy of cancellation of such an instrument cannot be granted because such a relief would not remove the cloud upon his title by the instrument and the proper remedy is to seek a declaration of the plaintiff's own title or a declaration that the sale deed is not binding or valid against the plaintiff. Thus, when a document is not executed by the plaintiff or by a person who can in any circumstance bind him, that document cannot create a cloud upon the title of the true owner, nor does it create apprehension that it may be a source of danger to him.

18. It is only in the case of instruments which are either executed by a party or purports to have been executed by a party or by a person who can under certain circumstances bind him that the relief under Sec. 31 of the Act can be claimed in law because in such cases only, could it be said that "there is a cloud on his title and an apprehension that if the instrument is left outstanding, it may be a source of danger". To illustrate, a party who has executed the document, or a principal in respect of a document executed by his agent or a minor in respect of a document executed by his guardian, etc., could under Sec. 31 of the Act request the court to deliver up and cancel the document. A person who neither has executed the document, nor is bound in any circumstance by the person who executed the document could not seek relief under Sec. 31 of the Act as the document is neither void nor voidable against him and as such document even if left outstanding is not capable of causing any injury to him. The remedy of such person, if he thinks that the document may create a cloud on his own title is to seek a declaration of his own title or that the impugned document does not affect his title.

19. In the present case appellant is not a party to Ext.B-1. Nor is the appellant bound under any circumstance by the person who has executed Ext.B-1. Exhibit B-1 is executed by the 2nd respondent acting as power of attorney holder of the 3rd respondent. In the circumstances Ext.B-1, assignment deed is neither void nor is voidable against the appellant and hence she could not seek relief under Sec. 31 of the Act. If the appellant thinks that Ext.B-1 might create a cloud on the title she has claimed, her remedy was to sue for declaration of the title she claims or that Ext.B-1 does not affect the titled she claims.

20. The next question is regarding the title claimed by the appellant over 11.600 cents. According to the appellant, entitlement of the 3rd respondent as legal heir of Lakshmikutty Amma is only for 4.500 cents and 1/3rd of the excess. Appellant claims that as she was allotted 9 cents and excess and Lakshmikutty Amma was allotted 4.500 cents and excess, she is entitled to 2/3rd of the excess and only the remaining 1/3rd of the excess would go to the 3rd respondent.

21. I have gone through the copy of Ext.A-1, partition deed. Appellant is allotted 9 cents and excess land and Lakshmikutty Amma is allotted 4.500 cents and excess land, both in survey No. 405/12. I do not find any provision in Ext.A-1 to hold that the excess land if any is to be divided between the appellant and Lakshmikutty Amma in the same proportion they got 9 cents and 4.500 cents, respectively. In the absence of any specific provision as to the manner in which the excess land if any is to be partitioned between the appellant and Lakshmikutty Amma, the reasonable and proper interpretation to be given to Ext.A-1, partition deed is that the excess land if any, has to be partitioned between the appellant and 3rd respondent (being the sole legal heir of Lakshmikutty Amma) equally.

22. As of now, contention of the appellant is that the total extent of excess land is 3.300 cents. If that be so, in the light of what I have stated above, appellant should get 9 cents and 1.650 cents out of the excess land and the 3rd respondent should get 4.500 cents and 1.650 cents being the remaining excess land. But, Ext.B-1, assignment deed is executed for 7.808 cents. I make it clear that extent of excess land if any available is stated here, only based on the plaint averments. It is for the trial court to enquire into and decide after proper survey of the properties what exactly is the land available for the appellant and the 3rd respondent (as sole legal heir of Lakshmikutty Amma) as per Ext.A-1, partition deed (or, to the 1st respondent consequent to Ext.B-1, as the case may be) and the extent of excess land if any available to them as aforesaid.

23. I found that no interference is possible with respect to the finding that appellant has no role in the construction of the building in plaint B schedule. When the excess land if any, which the appellant is entitled is being determined by the trial court after proper enquiry, the trial court shall ensure that enjoyment of the existing building is not affected and that the excess land if any, to which the appellant is entitled is allotted to her from that portion of property belonging to the 3rd respondent and situated towards the western side of the building in

plaint B schedule, after leaving sufficient space on the immediate west of that building for its proper and convenient enjoyment. It is also directed that if on measurement, any portion of the building in plaint B schedule is found to be overlapping into a the portion to which the appellant is found entitled, trial court shall make necessary adjustments in allotting the land to the appellant so that the building is not affected, at the same time ensuring that the extent to which appellant is found entitled, is given to her,

24. I have found that appellant is not entitled to seek cancellation of Ext.B-1, assignment deed. But that finding cannot put an end to the claim made by the appellant as it requires investigation. Having regard to the circumstances stated, I am inclined to give the appellant opportunity to amend the plaint and seek appropriate reliefs instead of cancellation of Ext.B-1, with consequential/ alternative reliefs as circumstances warranted. The substantial questions of law framed are answered accordingly. Resultantly, this Second Appeal is allowed by way of remand as under:

(i) While no interference is required with the finding of the courts below as to the claim of appellant regarding exclusive possession of plaint A and B schedules and that the building in the property was constructed by her, the dismissal of the suit as per judgment and decree of learned Munsiff, Aluva in O.S.No.14 of 2006 as confirmed by the learned Additional District Judge, North Paravur in A.S.No.33 of 2008 is set aside.

(ii) O.S. No. 14 of 2006 is remitted to the court of learned Munsiff, Aluva for fresh decision after giving the appellant opportunity to amend the plaint and seek appropriate reliefs in the light of the observations made above. Needless to say that on such amendment, respondent will get opportunity to file additional written statement in answer to the amended plaint.

(iii) If so advised and applied for by the appellant, learned Munsiff shall appoint an Advocate Commissioner to ascertain the total extent of land available to the appellant and the 3rd respondent (or to the 1st respondent, consequent to Ext.B-1, as the case may be) and identify the 9 cents and 4.500 cents in Sy. No. 405/12 referred to in Ext.A-1 and allotted to the share of appellant and Lakshmikutty Amma.

(iv) Trial court shall determine the extent of excess land if any, available for division. Such excess land if any, shall be divided among the appellant and the 3rd respondent (or the 1st respondent, consequent to Ext.B-1, as the case may be) equally.

(v) Trial court shall ensure that the half share in the excess land if any found by it to which the appellant is entitled, is allotted to her on the western side of the existing building after leaving sufficient space on the immediate west of the building for its proper and convenient enjoyment.

(vi) Trial court shall ensure that in case any portion of the building overlaps into

the property to which the appellant is found entitled, necessary adjustment shall be made so that the building is not affected and that much extent of land overlapping into the property of the appellant shall be allotted to the appellant elsewhere as indicated above.

(vii) Parties shall appear in the trial court on 30-6-2012. In case the 3rd respondent does not appear, trial court shall issue summons to her for her appearance.

All pending interlocutory applications will stand dismissed.