
(1998) 02 KL CK 0027
In the High Court Of Kerala
Case No : S.A. No. 811 of 1992-E

Noorudeen and Others

APPELLANT

Vs

Umairathu Beevi and Others

RESPONDENT

Date of Decision : 06-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Contract Act, 1872 — Section 17, 18
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1998 Ker 171 : (1999) 4 CivCC 344

Hon'ble Judges : S. Marimuthu, J

Bench : Single Bench

Advocate : M.M. Abdul Aziz and M.M. Saidumuhammed, for the Appellant; B. Krishnamani, for the Respondent

Final Decision : Dismissed

Judgement

S. Marimuthu, J.—This appeal is directed against the judgment delivered by the District Judge, Kollam in A.S. No. 123 of 1989 dated 22-11-1991. The appellants are the legal representatives of the second defendant who were brought on record as defendants 6 to 8 on the; demise of the second defendant. The original plaintiff Mytheen Kunju Abdul Rehman Kunju died pending the first appeal. Therefore his legal representatives have been brought on record as plaintiffs 2 to 5 who are the respondents along with other defendants 1, 3, 4 and 5.

2. The deceased plaintiff filed O.S. No. 622/ 83 before the Munsiff Court, Quilon for declaration of title and possession of the plaint schedule property, to set aside Ext. B2 sale deed and Ext. B3 hypothecation deed and for prohibitory injunction restraining the defendants from committing trespass into the suit property and from interfering with the enjoyment of the plaintiff. The plaint schedule property is 30 cents. The case of the plaintiff for consideration is as follows :

The deceased plaintiff got the suit property under Ext. A1 partition of the year 1967. The property is lying contiguous to the properties of the other sharers

under Ext. A1. The first defendant is the eldest son of the deceased first plaintiff. He studied up to Pre-Degree and he was unemployed. While searching for employment he happened to approach the second defendant. The second defendant gave assurance to the first defendant that he would get a job for the first defendant in Gulf countries, provided, if the first defendant would pay a sum of Rs. 15,000/-. Out of Rs. 15,000/- the second defendant, who was in Gulf country then, required Rs. 3000/- for the preliminary expenses. The plaintiff has lost his vision in both the eyes on account of accute diabetes. The first defendant approached his father the plaintiff and informed him that by executing a hypothecation deed of the suit property in favour of the second defendant, they would raise a sum of Rs. 3000/- for the preliminary expenses of the first defendant to go to Gulf country. Though the first plaintiff had no money at that, time, he was very anxious in getting an employment for his son the first defendant --and therefore he agreed to execute the hypothecation deed as required by defendants 1 and 2. Therefore, on 22-1-1983 all of them went to the Sub-Registrar's office, Kundara, where the 5th defendant was an employee of the Sub-Registrar's office. Defendants 1, 2 and 5 had already prepared the document Ext. B2 and they obtained the signature of the first plaintiff in the document in the presence of the Sub-Registrar on the representation that it was only a hypothecation deed for a sum of Rs. 3000/-. The first plaintiff on the representation of the defendants 1 and 2 believed that it was a hypothecation deed for a sum of Rs. 3000/- and signed the documents in the places shown by them, though he was totally blind. In the month of September, 1983, the first plaintiff came to know that the defendants 4 and 5 were attempting to trespass into the suit property. Therefore the first plaintiff obtained the registration copy of the Ext. B2, namely, Ext. A4. Only after seeing Ext.A4, the first plaintiff came to know that by exercising fraud and misrepresentation, the defendants 1 and 2 have got Ext.B2 deed registered as sale deed. Therefore, he immediately approached the Civil Court and filed the suit for reliefs stated supra.

3. The first defendant filed a written statement supporting the case of the first plaintiff. In other words, his allegations in the written statements would be that he believed the second defendant that it was only a hypothecation deed executed for Rs. 3000/- and, though he has studied up to Pre-Degree, he did not go through the documents. The defendants 4 and 5 in their written statement would contend that the first plaintiff transferred his right to the second defendant under Ext.B2 sale deed on receipt of Rs. 3000/- and put the second defendant in possession of the same. Now the suit property is in the possession of the 4th defendant by virtue of the power of attorney executed by the second defendant. The second defendant then executed Ext.B3 hypothecation dated 27-6-83 in favour of the 3rd defendant. The averment of the first plaintiff is that he was totally blind, that he was misrepresented by the second defendant that Ext.B2 is a hypothecation deed, etc. are denied. The second defendant never agreed to seek a job for the first defendant in Gulf countries nor did he demand Rs. 3000/- from the first defendant or from the first plaintiff for preliminary expenses. The

sale deed, Ext.B2 was for Rs. 3000/- received by the first plaintiff and the first plaintiff knew even at the time of execution of Ext.B2 that it is a sale deed and not a hypothecation. The first plaintiff and first defendant executed another sale deed (Ext.B1) subsequently on 20-9-83. The execution of Ext.B1 sale deed would apparently disclose that there was no bitter enmity or whatsoever between the first plaintiff and his son the first defendant at the time of execution of Ext.B2 sale deed. The defendants never attempted to trespass into the suit property since the suit property is in their possession. The suit has been filed at the instigation of the first defendant. The suit property has been attached in O.S. No. 46/83 filed against the second defendant. So the suit is liable to be dismissed. Pending the suit, the second defendant died. Therefore his father and children were brought on record as defendants 2 to 8 who are the appellants herein and who are accepting the written statement filed by the defendants 4 and 5.

4. In the trial Court, Exts. A1 to A7 and B1 to B5 were marked. A Commissioner was also appointed in the trial Court where he filed Exts. C1 plan and C2 report. In addition to the above Exts. filed by either side, on the plaintiff s side 11 witnesses were examined including the first plaintiff as PW-1 and on the defendants" side, Addl. 6th defendant was examined as D.W.-1. In addition to DW-1, three more witnesses were examined on the side of the defendants including the first defendant as DW-4. The trial Court after examining the evidence held that the plaintiffs have no title or possession over the suit property that the suit property was already sold under Ext.B2, that therefore the plaintiffs are not entitled to any relief sought for and that ultimately the suit was dismissed.

5. The legal representatives of the plaintiff filed A.S. No. 123 of 1989 before the District Court, Kollam as noticed above. The first appellate Court on appreciation of evidence both, oral and documentary, as well as on examination of the findings rendered by the trial Court, came to a conclusion that Ext.B2 sale deed came into existence only on the misrepresentation and fraud played by the defendants 1 and 2 and therefore that document is liable to be set aside and accordingly it set aside Ext.B2 sale deed and consequently. Ext.B3 hypothecation was also set aside. It also found that no possession of the suit property passed under Ext.B2. Ultimately, the first appellate Court reversing the judgment of the trial Court decreed the suit as prayed for. Now as pointed out above, the judgment of the lower appellate Court is challenged in this appeal. The points that were urged before me for consideration are:

- (i) Whether Exts.B2 sale deed and B3 hypothecation deed are the creation by fraud and misrepresentation?
- (ii) If Exts.B2 and B3 are genuine documents whether possession passed thereunder?
- (iii) Whether the plaintiffs-respondents herein are entitled to the permanent injunction sought for?

Point Nos. 1 and 2 :

The learned Counsel appearing for the appellants submitted that the deceased 1st plaintiff has taken a specific plea in the plaint that he was misrepresented and defrauded by his son the first defendant and the second defendant for getting Ext.B2 sale deed, as hypothecation deed. As P.W.-1 it is his evidence that there is no enmity between him and his son the first defendant who has also been examined as D.W.4. The first defendant in his written statement would allege that he did not exercise fraud or misrepresentation, but his father the first plaintiff believed the words of the second defendant that Ext.B2 is only a hypothecation deed and not a sale deed. Further, his written statement and his evidence as D.W.4 would go to show that as he was more anxious in getting a job after his education was over he did not properly apply his mind into the details of the document Ext.B2 whereas he was very anxious in getting the money of Rs. 3000/- for paying to the second defendant towards primary expenses of his job at Gulf countries. Further, the first defendant and the deceased first plaintiff had been residing in the same house and the first defendant was unmarried. When the evidence of both PW-1 and DW-4 as well as the plaint averment and the statement of the first defendant in the written statement in respect of misrepresentation and fraud said to have been played by the first defendant along with the second defendant are not in accordance with the plea in the plaint. On the other hand, they are inconsistent and therefore it can be rightly held that the plaint is not drawn in accordance with the Order VI, Rule 4, C.P.C. Therefore the entire case of the plaintiff that Ext.B2 was executed as a hypothecation deed cannot be believed even for a moment. Thus the learned Counsel for the appellants advanced an argument and in support of his argument the learned Counsel put before me a case of this Court reported in *United India Insurance Co. Ltd. and Another Vs. Andrew Vivera*, . No doubt, therein this Court has held that allegation of fraud/misrepresentation, breach of trust, wilful default or undue influence etc., must be set forth in full particulars and not vaguely. If pleadings are vague and not specific no amount of evidence can salvage the position. A reading of the plaint in this instant case would go to show that the specific allegations have been made by the deceased first plaintiff against his son the first defendant and second defendant in respect of fraud and misrepresentation. No doubt, in the evidence, PW-1 has stated that he has no misunderstanding or even a smallest amount of animosity towards his son the first defendant. Even after knowing that his son has misrepresented him in the execution of the document Ext.B2, a father like PW-1, no doubt, will not go to the extent of deposing in the witness box that there is better animosity existing between his son and himself, particularly, when the amount of Rs. 3000/- was intended only for the purpose of seeking a job for his jobless son the first defendant in Gulf countries on the fascinating assurance given by the second defendant who admittedly was then employed in the Gulf countries. Because of the above version of PW-1 in the box, I do not think it is quite contrary to the plaint averment wherein it is specifically referred to misrepresentation and fraud

played by the first and second defendants. In this context it is also to be remembered that the first defendant is an young man studied up to Pre-Degree, who was then under the care of the father and residing with the father. So, naturally for getting a job like the first defendant, his father also will be equally anxious. Therefore, more anxiety in getting a job for his son will not creates bitter enmity between the son and father in spite of the fact that he was misrepresented or defrauded by the son. At that stage the only purpose was to secure some money for getting the job. What I mean here is that because of the execution of the Ext.B2 deed on the misrepresentation or fraud played by the first and second defendants, it is very difficult to conclude that between the father and son there have been always bitter enmity and animosity existing on account of the said document. It is natural that though the son, at one particular point of time for the execution of the deed, misrepresented the father for securing money and that too only for the purpose of securing a job on the assurance given by the second defendant the father will not take into heart and reserve there bitterness forever. In this view of matter or on account of the above evidence of PW-1, DW-4 and the statement of DW-4 in the written statement, it cannot be concluded that the plaint averments are not in accordance with Order VI, Rule 4. For it is a peculiar case arising at a peculiar circumstance as pointed out above, and when that be so, what the plaintiff has stated regarding misrepresentation or fraud in the plaint will not persist throughout between the father and son. On account of the surrounding circumstances, I am of the view that the above citation referred to by the learned Counsel appearing for the appellants will have no application to the facts of the present case.

The learned Counsel appearing for the appellants further submitted that Ext.B2 is a registered sale deed executed for Rs. 3000/- and therefore no oral evidence can be let in as regards a registered document under Sections 91 and 92 of the Indian Evidence Act. No doubt, the law is that ordinarily oral evidence cannot exclude documentary evidence. But at the same time there is a proviso u/s 92 of the Indian Evidence Act which shows as follows :

"92. Exclusion of evidence of oral agreement,

xx xx xx xx Proviso (1) : Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, (want of failure) of consideration, or mistake in fact or law." Therefore, in this case though Ext.B2 is a registered document no doubt, the aggrieved party is entitled to let in oral evidence to the effect that it came into existence on account of misrepresentation and fraud. Therefore, now the point is whether there is legal and reliable evidence on the side of the respondents-plaintiffs that Ext.B2 came into existence on account of misrepresentation and fraud played by the 1st and 2nd defendants on the deceased 1st plaintiff.

6. The learned Counsel appearing for the plaintiffs would submit the following circumstances to establish misrepresentation and fraud played by the 1st and 2nd defendants in the execution of Ext.B2 deed. First one is the assurance given by the 2nd defendant to the 1st defendant that he would secure a job for the 1st defendant at Gulf countries at a cost of Rs. 15000/- out of which he required an advance of Rs. 3000 for the initial expenses. Admittedly, the 1st defendant being an young man studied up to Pre-Degree at that time was seeking a job. The 2nd defendant was at that time in the Gulf countries. Therefore, believing the words of 2nd defendant it is natural for the 1st defendant to approach his father to raise a sum of Rs. 3000/- by any means for his job. This circumstance would indicate that the 1st and 2nd defendants colluded and the 2nd defendant ought to have instructed the 1st defendant to get a sale deed from his father for the suit property measuring about 25-30 cents misrepresenting his father that it is only a hypothecation deed. The initiation of misrepresentation by the 2nd defendant, we can expect the first defendant to comply with because he was in bad need of securing job at that time. No doubt, though he has been instigated or abetted by the 2nd defendant in the act of misrepresentation and fraud, it cannot be said that the 1st defendant is not a party to fraud and misrepresentation played on his father. The first appellate Court in this context clearly and elaborately discussed the above circumstances and evidence and its conclusion was that misrepresentation and fraud were played by both defendants 1 and 2. I feel, that conclusion arrived at by the first appellate Court is perfectly correct. The second circumstance pleaded by the learned Counsel appearing for the respondents would be that the first plaintiff was totally blind for a long period on account of acute diabetes. On the other hand, the contention on the part of appellants was that he was able to understand the contents of the document. To understand the contents of the document is not the question herein. The question here is whether the first plaintiff was totally blind at the time of execution of Ext.B2. In support of the above, the learned Counsel appearing for the respondents placed before me the medical certificate marked as Ext.A3 and disability certificate Ext. A2 and the doctors also have been examined on the side of the plaintiffs as PWs. 4 to 6 and 11. The evidence of the doctors and the documents Exts.A2 and A3 would evince that PW-1 was blind for several years. PWs. 4, 5 and 6 had occasions to examine the first plaintiff and PW-6 had occasion to treat him for a long period as PW-6 has been running a nursing home who opined that the first plaintiff had been taking treatment and he lost his full vision long ago prior to the execution of Ext.B2. An Eye Specialist who was leading the Medical Board has given his opinion that PW-1 has lost full vision and his opinion has been concurred by the other doctors who have been examined in this case. The evidence of the above doctors as well as Exts.A2 and A3 certificates, I do not find any reason to reject. As against PWs. 4, 5, 6 and 11 in respect of the total blindness of PW-1, the learned Counsel appearing for the appellants admitted that if really the 1st plaintiff was blind, there should have been an endorsement to that effect in Ext.B2 sale deed. No doubt, no such enforcement was made in Ext.B2 at the time of execution of the deed that the

executant was blind and as found by the lower appellate Court, there is no specific provision that there must be an endorsement in the sale deed or in any registered deed that it has been executed by a blind man. For even a blind man when he is in a sound state of disposing mind can very well execute a sale deed, especially when he has understood the contents of the document and nature of the document. In the instant case due to the absence of such endorsement in Ext.B2, I think, it is very difficult to accept the contention of the learned Counsel that the absence of such endorsement in Ext.B2 will affect the case of the plaintiffs.

7. The next circumstance put by the learned Counsel appearing for the respondents would be about the sale consideration of the property. The property under Ext.B2 comes to 30 cents. But the actual extent of property comes to 25 cents as seen in the Commissioner's report and plan. Whether it may be 25 cents or 30 cents is not so material sold under Ext.B2. It is a definite case of the second defendant that he purchased 30 cents for a consideration of Rs. 3000/- on 20-9-83. To show that the sale consideration is totally insufficient and that consideration alone is sufficient to record a finding that fraud and misrepresentation had been played by defendants 1 and 2 on a guise that Ext.B2 is a hypothecation deed. In support of this argument, the learned Counsel appearing for the respondents brought to my notice Ext. A6, a copy of the registration of the sale deed dated 13-4-82, just a few months prior to Ext.B2. In Ext. A6, 4 cents of property in that locality has been sold for a sum of Rupees 8000/- and PW-9 is the vendor for Ext.A6. It cannot be said that an extent of 30 cents can be sold for a meagre price of Rs. 3000/- at that time in that locality. The first plaintiff later executed Ext.B1 sale deed on 20-9-83. Under Ext.B1 8 cents of land has been sold for a sum of Rs. 40,000/-. So, Exts.A6 and B1 are very important documents to fix price of the land in that locality at the time of Ext.B2. Admittedly, Exts.A6 and B1 properties are lying near the property covered by Ext.B2. Within a short duration on either sides these documents have been registered. There is no evidence that there is a lot of difference in the fertility of the soil of the lands covered by these documents. When that be the position, it is apparently clear that the sale price in Ext.B2 as submitted by the learned Counsel for the respondents is totally inadequate and the inadequacy itself is a strong piece of evidence to support the case of the respondents-plaintiffs. Ext.B2 was obtained by the second defendant under the pretext of a hypothecation deed. Apart from that, the defendants have not come forward with true versions and their case is also not cogent. The inconsistent pleadings of the defendants themselves create strong suspicious circumstances against them and in support of the plaintiffs.

8. The 6th defendant is the father of the deceased second defendant who, as argued by the learned Counsel, died in an accident and his legal representatives are impleaded and they are the appellants herein. As I have pointed out above, it is the definite case of the 2nd defendant that he purchased the suit property for a consideration of Rs. 3000/-. The second defendant borrowed a sum of Rs.

30,000/- from a 3rd party for which a suit was filed in O.S. 46/83. That suit was decreed. The appeal filed in that suit was also ended against the second defendant. Now it appears that the legal representatives of the second defendant who are the appellants herein are repaying the decree amount. Sixth defendant, the father of the 2nd defendant herein was examined on the side of the defendants in that money suit. Certified copy of the deposition of the 6th defendant, has been marked as Ext A7 and the 6th defendant has been examined as DW-1 in this present suit and, his evidence as DW-1 is in accordance with the written statement filed in this suit of the 2nd defendant, that is to say, the suit property was purchased for a sum of Rs. 3000/- whereas in Ext.A7 DW-1 has deposed that his son borrowed a sum of Rs. 30,000/- and that the amount was paid as a sale consideration of the suit property to the first plaintiff though the deed was registered for a sum of Rs. 3000/-, and the contra version of the 6th defendant in Ext.A7 has completely demolished the case of the defendants and, as I have pointed out above, this is one of the strong circumstances against the case of the defendants and, in fact, it is supporting the case of the plaintiffs that Ext.B2 was executed by the first plaintiff as if it is a hypothecation and not a sale deed.

9. The next circumstance placed by the learned Counsel for the respondents would be that possession is still with them. On the other hand, the learned Counsel appearing for the appellants submitted that possession has already been passed to the second defendant at the time of execution of Ext.B2 sale deed. To establish possession the defendants have examined DWs.2 and 3. DW-2 is none other than the driver of the second defendant and he hails from a far off place. He is not residing near the suit property. DW-3 is a coconut climber and he was working under DW-1 and he also hails from a far off place. No witness from that locality has been examined to show that the second defendant was in possession pursuant to Ext.B2 sale deed and now possession is in the hands of the appellants. To rebut the above evidence of the DWs. 2 and 3, plaintiffs have examined PWs-2 and 3 apart from PW-1. PWs.2 and 3 would depose that the property is still in the possession of the plaintiffs and it is being enjoyed by them. It seems PWs.2 and 3, in fact, corroborate the evidence of PW-1. DW-4, though he was a party to the fictitious document, also supports the "evidence of PWs-2 and 3 in respect of possession, PW-7 -- the former Panchayat President, Perinad, would depose that the property is in possession of the plaintiffs. Thus, when I examined the evidence of PWs. 1, 2, 3 and 7 as well as the oral evidence of DW-2 and 3, I have no hesitation to act upon the evidence of the witnesses examined on the plaintiffs side that the plaintiffs are in possession of the property and no possession fell on the hands of the 2nd defendant on the execution of Ext.B2 sale deed. The learned Counsel for the appellants submitted on the basis of Exts.B4 and B5 tax receipts to prove the mutation and payment of tax, and it is needless to say that it is well settled principle of law that payment of tax or change of Patta will not confer title. In this case, Ext.B2, as I have pointed out above, came into existence only on the basis of fraud and

misrepresentation played by the first and 2nd defendants, Therefore payment of tax under tax receipts Exts.B4 and B5 will not advance the case of the appellants to any extent. The first appellate Court, in fact, elaborately dealt with the above matters and concluded that Ext.B2 came into existence by means of fraud and misrepresentation and therefore Exts.B2 and B3 are liable to be set aside. That conclusion arrived at by the first appellate Court need no interference by this Court. Therefore, it can be rightly confirmed. On account of the foregoing reasons, all the points are answered in favour of the respondents-plaintiffs and against the appellants-defendants.

In the result, this Second Appeal stands dismissed confirming the judgment of the lower appellate Court, directing the parties to suffer their own costs.