
(2015) 09 KL CK 0175
In the High Court Of Kerala
Case No : Mat. Appeal No. 269 of 2015

Omana

APPELLANT

Vs

Mallika and Others

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10A

Citation : (2015) 09 KL CK 0175

Hon'ble Judges : C.K. Abdul Rehim, J; Mary Joseph, J

Bench : Division Bench

Advocate : Unnikrishnan V. Alapatt, for the Appellant; G. Sreekumar (Chelur),
Advocates for the Respondent

Final Decision : Allowed

Judgement

C.K. Abdul Rehim, J—The above Mat.Appeal is instituted against an order passed by the Family Court, Thodupuzha in I.A. No. 370 of 2012 in O.P. No. 84 of 2007, dated 15.5.2013. O.P.84 of 2007 was instituted before the Family Court by the respondents herein, who are the wife and children of the 1st respondent before the Family Court, who is not made a party in I.A. No. 370 of 12 or in this appeal. In the original petition, the respondents were seeking return of gold ornaments, declaration of title with respect to certain immovable properties, cancellation of certain documents and a permanent prohibitory injunction etc. Allegation was that the husband of the 1st respondent, who is the 1st respondent in the case, had executed a gift deed in favour of the 1st respondent herein with respect to the immovable property, during the year 2003 and thereafter the 1st respondent was in possession of the said property. But due to the vengeance against the 1st respondent herein, the 1st respondent before the Family Court had executed another deed on 9.7.2003, cancelling the gift deed executed earlier. Thereafter the said property was transferred to a person named Ratheesh Kumar by virtue of Document No. 1225 of 2003. The property was further transferred to the name of the appellant herein through Document No. 1288 of 2003. The appellant

herein was cited as the 3rd respondent in the said original petition before the court below. It is stated that, initially the respondents herein have instituted another original petition seeking the very same relief before the Family Court, Thrissur as O.P. No. 1016 of 2013. That court had ordered to return the case, finding that the said court lacks jurisdiction. It is alleged that the respondents, without complying with the procedure contemplated under Rule 10A of Order VII of the Code of Civil Procedure, had instituted a fresh original petition as O.P.84 of 2007 before the Family Court, Thodupuzha. According to the appellant, she had not received any notice from the Family Court, Thodupuzha in O.P. No. 84 of 2007 and she was totally unaware about filing or pendency of the above case, till 25.6.2012. On the said date, son of the appellant got information from an employee of the Family Court that an ex-parte order was passed against her. On the enquiries made by the appellant it was revealed that O.P.84 of 2007 was decreed ex-parte on 26.3.2012. It is alleged that the respondents have purposefully shown a wrong address of the appellant in the original petition filed before the Family Court. It is mentioned that the appellant herein is a bona fide purchaser of the immovable property for valuable consideration.

2. Under the above mentioned circumstances, the appellant herein had approached the Family Court in I.A. No. 370 of 2012 seeking to set aside the ex-parte decree. But the court below had dismissed the interim application through the order impugned in this appeal. It is aggrieved by the dismissal of the application to set aside the ex-parte decree, this appeal is filed.

3. Contention of the appellant is that, despite specific findings arrived by the court that no notice was served on the appellant, the Family Court had dismissed the application to set aside the ex-parte decree, stating totally extraneous reasons. It was also pointed out that the Family Court had omitted to take note of the fact that the original petition was instituted without re-presentation of the case which was returned by the Family Court, Thrissur and without compliance of the procedure contemplated under Rule 10A of Order VII CPC. It is contended that the Family Court had failed to exercise its jurisdiction in a judicious manner by considering the relevant aspects for deciding the issue as to whether the ex-parte decree need to be set aside or not.

4. Heard; counsel appearing on both sides. This court takes note of the fact that the specific contention raised by the appellant in I.A. No. 370 of 2012 was that, O.P.84 of 2007 was instituted without complying with the procedure contemplated under Rule 10A of Order VII CPC, after return of the plaint by the Family Court, Thrissur. It is the case of the appellant that she was totally unaware about institution of O.P.84 of 2007 before the Family Court, Thodupuzha and that no notice was served on her. It is specifically contended that she came to know about the ex-parte decree only on 25.6.2012. Allegation was also raised to the effect that the respondents have shown a wrong address of the appellant in O.P.84 of 2007 and that the ex-parte decree was obtained in a circuitous manner by taking steps in a wrong address.

5. It is pertinent to note that, observations in the impugned order is that, when notice was sent to the appellant in O.P.84 of 2007 she did not accept the same deliberately. But at the same time it is observed that, notices sent to the appellant in the original petition were returned repeatedly and she was served only through paper publication. When notices sent to the appellant were returned unserved repeatedly and when service was effected only through paper publication, there is no basis for the observation that the appellant had not accepted the notice deliberately, unless it is evident from records of the process server that acceptance of notice was avoided in any manner. With respect to the specific allegation that notices were taken in a wrong address, the court below observed that, the address of the appellant shown in the original petition would indicate that she is residing at Moolamattom kara in Arakkulam village. But the court below observed that there is absolutely nothing on record to show that the appellant had ever lived at Moolamattom address. As observed above, such an issue is totally irrelevant when it is accepted that notice was not served at any of the addresses of the appellant, and when service was completed only through paper publication. Therefore, reliance placed by the court below on the controversy regarding correctness of the address of the appellant, was not a proper approach in the matter, while deciding the question regarding setting aside of the ex-parte decree.

6. Further, this court takes note of the fact that, the learned Judge of the Family Court had gone deep into the issues involved in the case based on the factual matrix and observed that, the respondents 1 and 2 in the original petition, who also had suffered ex-parte decree, had not joined hands with the appellant in filing the petition to set aside the ex-parte decree. Therefore the court below observed that the application seeking to set aside the ex-parte decree filed by the appellant, without arraying the original respondents 1 and 2 as parties, can be construed as a circuitous manner adopted by the appellant, he being an instrument in the hands of the original 1st respondent. But it is to be noticed that the interim application to set aside the ex-parte decree was filed citing the respondents herein, who are the plaintiffs, on the party array. It cannot be contended that such an application is not maintainable because the co-respondents were not arrayed as parties in the interim application. No prejudice will be caused to the co-respondent if the ex-parte decree against the appellant is set aside.

7. Yet another reason mentioned by the Family Court while dismissing the interim application is that, the appellant had deposed about a subsequent transfer. The court below had found fault with the appellant in the transferee not approaching the court. But this court is of the opinion that all such aspects will not preclude the appellant from contesting the suit (the original petition before the Family Court). Evidently, when the suit is decreed ex-parte against the appellant, she has got every right to approach the court seeking to set aside the ex-parte decree, on the basis of any valid contention that she was not aware about the suit or that she has not received any notice in the case. When such an

application is filed, the court below ought to have considered it on merits based on the plain aspect as to whether there was notice in the suit to the person who is seeking to set aside the ex-parte decree. Instead, we are constrained to observe that, the court below was carried away by extraneous factors which are not crucial or relevant in deciding the issue. Since it is clearly observed in the impugned order that the appellant was not served with any summons in O.P.84 of 2007 and that the service was effected only through paper publication, we are of the opinion that the appellant was successful in making out a case before the court below for setting aside the ex-parte decree. Hence we are inclined to allow the appeal and to allow the application seeking to set aside the ex-parte decree.

8. Therefore the above Mat.Appeal is hereby allowed. The impugned order of the Family Court, Thodupuzha in I.A. No. 370/12 in O.P.84/2007 is hereby set aside. I.A. No. 370 of 2012 will stand allowed. The Family Court will proceed with O.P.84/2007 afresh, against the appellant herein, after affording her a proper opportunity to file written statement and to participate in the trial.

Considering the fact that the original petition is of the year 2007, the Family Court is directed to take all earnest steps to dispose of the case at the earliest possible.