(2011) 03 KL CK 0030

In the High Court Of Kerala

Case No : Writ Petition (C) No. 9342 of 2008

P.A. Hamsa		APPELLANT
	Vs	
The District Registrar General		RESPONDENT

Date of Decision : 14-03-2011

Acts Referred:

Kerala Stamp Act, 1959 — Section 2(d), 33(1), 35, 37(2)
Registration Act, 1908 — Section 32, 32A, 34, 71, 71
Transfer of Property Act, 1882 — Section 54, 7

Citation : (2011) 3 KLJ 353 : (2011) 8 RCR(Civil) 831

Hon'ble Judges : K.T. Sankaran, J

Bench : Single Bench

Advocate : A.P. Chandrasekharan, Prabha R. Menon and M. Krishnakumar, for the Appellant; Nisha Bose, (GP), T.P. Kelu Nambiar and M. Sasindran, for the Respondent

Final Decision : Dismissed

Judgement

K.T.Sankaran, J.—An extent of 20.0262 Acres of land was sold by Indus Educational Academy Private Limited represented by its Chairman and Managing Director, P.A.Hamza in favour of Fortune Five Minerals Exports Private Limited, represented by its Managing Director B.M. Farookh, as per Ext. R3(a) registered sale deed dated 31.8.2007. Another extent of 1.15 acres of land was sold by P.A. Hamza (petitioner) in favour of Fortune Five Minerals Exports Private Limited represented by its Managing Director B.M.Farookh, as per Ext. R3(b) registered document dated 31.8.2007. The consideration for Ext. R3(a) document is Rupees 1.50 Crores while that for Ext. R3(b) is Rupees 5,40,000/-. Indus Educational Academy Private Limited represented by its Chairman and Managing Director P.A. Hamza sought to register a cancellation deed (Ext. P1) dated 24.12.2007 to cancel Ext. R3(a) sale deed. The petitioner, P.A. Hamza, executed another cancellation deed dated 24.12.2007 (Ext. P2) cancelling Ext. R3(b) sale deed and he sought to register the same. The Sub Registrar before whom the cancellation deeds were presented for registration impounded the documents and sent the same to the District Registrar (General), Kozhikode under Sections 33(1) and 37(2) of the Kerala Stamp Act. The District Registrar issued Exts. P3 and P4 notices dated 2.2.2008 to the executants of the cancellation deeds stating that stamp duty at 10% computed on the consideration shown in the sale deeds should be paid under Article 21 of the Kerala Stamp Act along with penalty at 10 times to enable the registration of the cancellation deeds. The petitioner sent Exts. P5 and P6 objections to Exts. P3 and P4 notices. He contended that no stamp duty is payable under Article 21 of the Kerala Stamp Act. The District Registrar passed Exts. P7 and P8 orders dated 3.3.2008 holding that the cancellation deed of a sale deed would be a conveyance and therefore, stamp duty is payable under Article 21 of the Kerala Stamp Act. Accordingly, the District Registrar (General) directed payment of stamp duty @ 10% on the consideration shown in the respective sale deeds along with penalty of Rs. 500/- each, within a period of 15 days for registering the cancellation deeds. The Sub Registrar was authorised to receive the stamp duty and penalty. It was also mentioned in Exts. P7 and P8 that if the stamp duty and penalty are not paid, steps would be taken to realise the said amounts.

2. Exts. P7 and P8 are under challenge in this Writ Petition.

3. The reliefs prayed for by the petitioner are the following:

i) By the issuance of a writ of certiorari or any other appropriate writ or order set aside Exts. P7 and P8 orders

ii) direct respondents 1 and 2 to effect due registrations of Exts. P1 and P2 cancellation deed Nos. P6/2007 and P7/2007 mentioned in Exts. P7 and P8 orders

iii) declare that the order No. DDs No. 19664/91 LR (A) 3 dated 9.7.1992 of Land Revenue Commissioner is inapplicable to the instant case as the sale deeds were executed without receiving consideration which fact is specifically stated in Exts. P1 and P2 cancellation deeds and

iv) Pass any other order or direction which this Hon''ble Court deems fit and necessary in the circumstances of the case.

4. Relief No. (iii) relates to an order 9.7.1992 passed by the Land Revenue Commissioner holding thus:

"There is no provision in the Kerala. Stamp Act to cancel a deed of conveyance. Therefore, the Board of Revenue agrees with the views of the Inspector General of Registration and holds that the impounded document No. P6/''89 of Sub Registry Office, Ernakulam is a conveyance deed falling under Article 22 of the schedule to the Kerala Stamp Act for the purpose of stamp duty.

5. Copy of the order dated 9.7.1992 passed by the Land Revenue Commissioner was made available by the learned Government Pleader. That order relates to a document which was impounded by the Sub Registrar''s Office, Ernakulam. The said order was referred to in Exts. P7 and P8.

6. Sri. A.P. Chandrasekharan, learned senior counsel appearing for the petitioner submitted that Article 15 of the Kerala Stamp Act will apply in the case and Article 21 thereof has no application at all. Articles 15 and 21 read as follows:

15 Cancellation-Instrument of (including any instrument by which any instrument previously executed is cancelled), if attested and not otherwise provided for:

Two hundred and fifty rupees

21 Conveyance [as defined by Section 2(d), other

Two rupees for every Rs. 100

than a conveyance specified in No. 22, not being under No. 55]

or part a transfer charged or exempted thereof, of the fan-value of the property or the amount or value of the consideration for such conveyance, whichever is higher..

7. Sri.T.P. Kelu Ncuicbiar, Senior Advocate appearing for the third respondent raised a preliminary objection and submitted that against that impugned order, a suit will lie u/s 77 of the Registration Act. The Senior counsel submitted that therefore, the Writ Petition is not maintainable.

8. When the Writ Petition was filed, only the District Registrar (General) and the Sub Registrar, Kozhikode were made as respondents The interim relief prayed for in the Writ Petition is to restrain the respondents from initiating any proceedings" against the petitioner in pursuance of Exts. P7 and P8 orders. Later, the petitioner filed I.A. No. 4378 of 2008 praying for an interim order directing the respondents to register the cancellation deeds subject to the final decision in the Writ Petition. A learned Single Judge passed an order

Therefore, pending the Writ Petition there will be a stay of operation of Exts. P7 and P8 for two months. The Sub Registrar is directed to register the documents Exts. PI and P2 subject to the final decision in the Writ Petition. The petitioner is directed to take steps to implead the vendee Sri.B.M. Farookh.

9. As directed, the petitioner filed I.A. No. 9694 of 2008 to implead B.M.Farookh as the additional third respondent. It is submitted that as per the interim order, the cancellation deeds were registered by the Sub Registrar.

10. The preliminary objection raised by Sri. T.P. Kelu Nambiar, Senior Advocate, to my mind, is not sustainable. Sub Section I of dated 8.4.2008 in I.A. No. 4378 of 2008, the operative portion of which reads as follows: Section 71 of the Registration Act, 1908 provides that every Sub-Registrar refusing to register a document, except on the ground that the property to which it relates is not situate within his sub-district, shall make an order of refusal and record his reasons for such order in his Book No. 2, and endorse the words "registration refused" on the document; and, on application made by any person executing or claiming under the document, shall, without payment and unnecessary delay,

give him a copy of the reasons so recorded. Section 71(2) of the Registration Act states that "no registering officer shall accept for registration a document so endorsed unless and until, under the provisions hereinafter contained, the document is directed to be registered." Section 72 of the Registration Act provides for an appeal to the Registrar from the orders of the Suby Registrar refusing registration on ground other than denial of execution. Section 73 provides for an application to the Registrar where the Sub Registrar refuses to register the document on the ground of denial of execution. Section 77 of the Registration Act provides that where the Registrar refuses to order the document to be registered, u/s 72 or Section 76, any person claiming under such document, or his representative, assign or agent, may, within thirty days after the making of the order of refusal, institute in the civil Court, having jurisdiction, a suit for a decree directing the document to be registered.

11. In the present case, there was no refusal as such by the Sub Registrar to register the document. The Sub Registrar took the view that stamp duty at 10% of the consideration shown in the sale deed should be paid for the cancellation deed. The District Registrar (General) upheld the view taken by the Sub Registrar. As there was no refusal as such to register the document, I am not inclined to accept the contention that the remedy of the petitioner is to file a civil suit u/s 77 of the Registration Act.

12. The cancellation deeds, Exts. Pl and P2 are unilateral documents executed by the sellers under Exts. R3(a) and R3(b) sale deeds. The purchaser is not a party to the cancellation deeds. The purchaser has not put his signature in the cancellation deeds. The purchaser was not made known by the seller of the execution of the cancellation deeds. The reasons stated for cancellation under the cancellation deeds are the following:

a) It was mutually agreed to between the parties to the sale deed that the same was not intended to be acted upon.

b) It was mutually agreed to by the parties to the sale deed that the sale deed would not and need not be acted upon.

c) The sale deed is only a sham document.

d) The sale deed happened to be executed only on the request of the vendee.

e) It was mutually agreed upon by the parties to the agreements for sale that the purported sale deeds, if at all would be, operative only if and when the respective vendees paying the sale price in full and purchase the entire extent of property covered by all the three agreements and supplemented one mentioned in the cancellation deed.

f) No consideration was paid for the execution of the sale deed at any time by the vendee to the vendor.

g) Title and possession of the property covered by the sale deed was not intended to be transferred, conveyed, or given by the vendor in favour of the vendee.

h) Possession of the property continues to be with the vendor.

13. The question to be considered is whether Article 15 or 21 of the Kerala Stamp Act would apply to the cancellation deeds referred to above. Sale is defined u/s 54 of the Transfer of Property Act thus:

54. "Sale" defined- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

The sale deed takes place on the basis of a contract between the parties to the transaction to sell and buy. A price must be paid or promised or part paid and part promised to constitute a sale deed. Without consideration, there could be no execution of sale deed. By the amendment of the Registration Act, now it has been made mandatory that the photographs of the seller and buyer should be affixed in the sale deed. A sale deed, which is the result of a bilateral transaction, cannot be cancelled by the unilateral act of the seller. The instrument of cancellation mentioned in Article 15 of the Kerala Stamp Act does not include cancellation deed executed by one of the parties to the sale deed, cancelling a duly executed and registered sale deed. Cancellation of sate deed may take place by the decree of a competent civil court. In certain exceptional circumstances, a gift deed can be cancelled by the executant of the Gift Deed. Article 15 of the Kerala Stamp Act deals with such cases of cancellation where the junction of both the parties is not required to effect the cancellation of a duly executed registered document or where both the parties to the transaction otherwise could legally cancel a document executed by them. The sale being complete on the execution and registration of the sale deed, it cannot be unilaterally cancelled by the seller thereof. Such a cancellation deed of a sale deed cannot be registered invoking Article 15 of the Kerala Stamp Act. Even if stamp duty is paid under Article 21 of the Kerala Stamp Act, a duly executed and registered sale deed cannot be cancelled unilaterally by the seller. On execution of the sale deed, title to the property passes to the vendee. The vendee cannot be divested of his title by the unilateral act of cancellation of the sale deed by the vendor. Even on cancellation of the sale deed, the vendor would not get title to the property and only the vendee can confer title to the vendor. Such conferment amounts to conveyance. The view taken by the District Registrar (General) that stamp duty is payable under Article 21 of the Kerala Stamp Act, to that extent, may be correct, but it is not. correct to the extent that the unilateral cancellation deed of the sale deed executed and presented for registration by the vendor can be registered on payment of stamp duty under Article 21 of the Kerala Stamp Act.

14. It is not as if any document presented for registration should be compulsorily registered by the Sub Registrar, on payment of the stamp duty under the Kerala Stamp Act. A document which cannot be legally executed at all, like a unilateral cancellation deed of a sale deed, cannot be registered even if the executant

thereof is prepared to pay the stamp duty under Article 21 of the Kerala Stamp Act. An argument may be put forward that it is not necessary for the Sub Registrar to enquire into the question of validity of a document and that he is bound to register the document if proper stamp duty is paid. This argument is based on a misconception. It is not the duty of the Sub Registrar to register every document presented before him for registration,? unmindful of its validity and legality. Only if a valid document is duly executed and presented for registration, the Sub Registrar is bound to register the document. Part XII of the Registration Act containing Sections 71 to 77 would clearly indicate that there is no duty cast on the Registrar to register a document which is not legally executable and registrable.

15. A learned Single Judge of this court (Justice S. Siri Jagan), on an elaborate consideration of the various provisions of the Indian Contract Act, Transfer of Property Act, Registration Act and the Kerala Stamp Act, held in Pavakkal Noble John and another v. State of Kerala & others (ILR 2010 (3) Kerala. 979) as follows:

10. I shall now deal with the duty of the Sub Registrar in the matter of registration of a cancellation deed unilaterally executed by the vendor in the light of the above legal position. u/s 7 of the Transfer of Property Act, 1882, for a person to become competent to transfer property, two conditions have to be satisfied viz. (1) he has to be competent to contract and (2) he must be entitled to transferable property or he must be authorised to dispose of transferable property not his own. Section 32 of the Registration Act, 1908, details the persons who can present documents for registration, who shall be either the person executing the document or his representative or assign or the agent of such a person duly authorised by power of attorney. The provisions of Rule 191 have to be appreciated, in the light of the above provisions. Sub clause XII of Rule 191 lays down that the registering officer can refuse registration for the reason that the person purporting to have executed the document is a minor, an idiot or a lunatic. This reason relates to the competency of the person to contract, which is the 1st condition laid down in Section 7 of the Transfer of Property Act. Sub clause X of Rule 191 lays down that the registering officer can refuse registration for the reason that he is not satisfied as to the right of the person appearing as a representative, assign or agent so to appear. This reason relates to subsections (b) and (C) of Section 32 of the Registration Act and the latter part of condition No. 2 in Section 7 of Transfer of Property Act. Therefore essentially, as far as transfer of immovable property is concerned, the Registration Act and Rules are framed in terms of the Transfer of Property Act itself. Therefore, I am of opinion that want of capacity to transfer property as stipulated in Section 7 of the Transfer of Property Act, should also be a reason for which the Sub Registrar can refuse registration of a document relating to transfer of property. In fact that is exactly what has been provided for by sub clause VII of Rule 191, making it competent for the Sub Registrar to refuse registration for the reason that the document is presented by a person who has no right to

present it. As far as transfer of property is concerned u/s 7 of the Transfer of Property Act, 1882 only a person who is entitled to transferable property is competent to transfer property. u/s 32 of the Registration Act, 1908, the document shall be presented by the person executing the document, if he is presenting the document himself. Therefore, if a person is not entitled to transferable property, he cannot execute a document in respect of transfer of the property and therefore he is not a person competent to present such a document for registration. Under sub clause VII of Rule 191 of the Rules, the Sub Registrar can validly refuse registration of a document if it is presented by a person who has no right to present it. By cancelling a sale deed executed by him earlier, the vendor is actually attempting to retransfer the property to himself, which he cannot do, since he is no longer entitled to that property as the title had already passed to the purchaser on the execution of the sale deed unless the sale deed stipulates otherwise and for becoming entitled to be competent to execute a document in respect of that property he has to first get the earlier sale deed annulled by a court of law. On reading of all these provisions together, I am satisfied that a registering authority can refuse registration, if, on a cursory enquiry, it is clear that the person purporting to have executed the cancellation deed is not the person entitled to the property as on the date of execution. This he can easily do by merely looking at the document and the previous documents registered in respect of the property as per the register available in his office in respect of the property, which would show who is the present owner of the property. Section 35 of the Act indicates that such an enquiry is not alien to the powers and duties of the Sub Registrar. Going by Section 34 of the Indian Registration Act and Rule 67 of the Registration Rules (Kerala), at first blush it may appear that the registering officer cannot enquire into the validity of the document or the right of the executing party to execute the document. But to hold that under no circumstances the registering officer shall enquire into the competency of the person to execute the document and he shall blindly register the document except for the reasons mentioned in Rule 191, would lead to very disastrous and anomalous results. Take for example a case where a person presents for registration a sale deed executed by him selling the property comprised of the High Court or any government property for that matter; or an agreement between two persons whereby one agrees to kill a third person for consideration. Is the registering officer bound to register the same? If that is the position of law, then a cancellation deed cancelling any document by any person who have to be registered if the reasons mentioned in Rule 191 are not available. That cannot be the object of the above said provisions. But that does not mean that the Sub Registrar can make a roving inquiry to decide the validity of the document or the right of the executants to execute the document. A reasonable interpretation commensurate with the object of the Act and Rules would be that if by reading the document and looking at the previous documents registered in respect of the property he is satisfied that the document cannot be validly executed by the person purporting to have executed the same, he has to refuse to register the same and act in accordance with Section 71 of the Act. Therefore, I am of the opinion that by refusing to register a deed of cancellation of a sale deed, the Sub Registrar is only performing a duty cast upon him by the Registration Act and Rules, notwithstanding Rule 67 of the Registration Rules (Kerala) and the same is in consonance with the object of the Registration Act and Rules as elucidated above.

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16. The view that cancellation of a sale deed can be only bilateral, is also clear from the newly introduced Section 32A of the Registration Act, which reads thus:

32A. Compulsory affixing of photograph, etc.- Every person presenting any document at the proper registration office u/s 32 shall affix his passport size photograph and fingerprints to the document:

Provided that where such document relates to the transfer of ownership of immovable property, the passport size photograph and fingerprints of each buyer and seller of such property mentioned in the document shall also be affixed to the document.

If for transfer of ownership of immovable property photographs and fingerprints of each buyer and seller of the property are mandatory, by the same coin, cancellation deed of a sale deed being essentially a retransfer of the immovable property back to the vendor should also necessarily contain the photograph of both the parties to the sale deed, without which the cancellation deed cannot be validly registered. Of course an argument is raised to the effect that the said Section is applicable only when a person executes a sale deed for transfer of immovable property. But the words used therein are ''where such document relates to transfer of ownership of immovable property'', which is wide enough to include all documents relating to transfer of immovable property and not confined to sale deeds for transferring immovable property. A cancellation deed cancelling a sale deed is certainly a document relating to transfer of W.P(C). No. 9342 OF 2008 25 Immovable property and would come squarely within the said proviso. Section 32A has been incorporated in the Registration Act to prevent such misuse of the provisions of the Act and Rules. Non-compliance with Section 32A is certainly a very valid reason for the Sub Registrar to refuse registration of a cancellation deed relating to transfer of immovable property, as is clear from Clause VIIA of Rule 191. The Sub Registrar is therefore duty bound to insist upon the photograph and thumb impression of both parties to be included in the cancellation deed as well, as mandated by the proviso to Section 32 A of the Registration Act for registration of a cancellation deed of a sale deed and if the cancellation deed does not contain the photograph and thumb impression of both parties, he is statutorily bound to refuse registration of that document. The thumb impression of a person cannot be obtained in a document without his consent and his photograph cannot be validly affixed in a document without his consent. Therefore a cancellation deed of a sale deed can be registered only with the consent of both the original seller and the buyer and not unilaterally by the seller alone. For this reason also the registration of a cancellation deed unilaterally cancelling a sale deed by the seller, without the consent of the purchaser, is to be refused by the Sub Registrar.

16. I am in respectful agreement with the view taken by Justice S. Siri Jagan in the aforesaid judgment.

17. Therefore, I hold that the cancellation deeds in question cannot be registered unless the deeds are executed by the seller and buyer of the sale deeds in question. Exts. P7 and P8 orders issued by the District Registrar (General) enables the seller to register the cancellation deeds on payment of the stamp duty mentioned in the orders and penalty of Rs. 500/- each. It is true that Exts. P7 and P8 are not challenged before this court by the third respondent by filing a Writ Petition. Those orders were not issued after hearing the buyer under the sale deeds. The buyer is not bound by Exts. P7 and P8 orders. On getting notice in the Writ Petition, he has raised a contention that the cancellation deeds cannot be registered even if the seller is prepared to pay the stamp duty under Article 21 of the Kerala Stamp Act and the penalty ordered to be paid. Being the buyer, the third respondent is entitled to put forward that contention in defence to the Writ Petition challenging Exts. P7 and P8 orders. I uphold the contention put forward by the third respondent in this regard, in view of the findings rendered above and in the light of the decision in ILR 2010(3) Kerala 979.

18. It is to be noted that the transferor (seller) in Ext. R3(a) sale deed is Indus Educational Academy Private Limited, a Company incorporated under the Companies Act. The executant of the Ext. P1 cancellation deed is also Indus Educational Academy Private Limited. The petitioner in the Writ Petition is P.A.Hamza and not the Company referred to above. It is submitted that P.A.Hamza is the Chairman and Managing Director of Indus Educational Academy Private Limited. The said Company is an entity and the petitioner cannot in his individual capacity challenge the orders passed by the District Registrar against the Company. The buyer under Ext. R3(a) sale deed is Fortune Five Mineral Exports Private Limited, a Company incorporated under the Companies Act. That Company is not made a party in the Writ Petition. It is true that B.M.Farookh, the third respondent, is described as the Managing Director of Fortune Five Mineral Exports Private Limited in the sale deed. But that is not a substitute for non impleading Fortune Five Mineral Exports Private Limited as a party respondent in the Writ Petition.

19. Originally, the petitioner did not think it fit to make the purchaser a party in the Writ Petition. Only after this court passed an order to implead him, the third respondent was made a party. This conduct of the petitioner in not making the affected party a party to the Writ Petition is reprehensible. Even now, the purchaser, namely, Fortune Five Mineral Exporters Private Limited is not made a respondent in the Writ Petition.

20. It is also disturbing to note that the petitioner made an interim prayer in the Writ Petition for a direction to the Sub Registrar to register the cancellation deeds. The argument advanced appears to be that it was only a question of payment of stamp duty that was in dispute and therefore, that question could be resolved while disposing of the Writ Petition. In that premise, an interim order was passed by a learned Single Judge of this court directing the Sub Registrar to register the cancellation deeds. The petitioner was not justified at all in making a prayer in the Interlocutory Application which is also the main prayer in the Writ Petition. Now the question remains as to what should be done since the cancellation deeds were registered on the basis of the interim order passed by this court. It is trite that an act of court should prejudice none. The cancellation deeds were not liable to be registered at all. However, the cancellation deeds were registered only on the basis of the interim order passed by this court. The error has to be rectified. Therefore, I direct the Sub Registrar, Kozhikode to cancel/strike off/revoke the cancellation deeds referred to above by making appropriate entries in the relevant registers. There will be a direction to the second respondent that under no circumstances, the cancellation deeds which happened to be registered in the circumstances mentioned above, should be shown as an encumbrance in the encumbrance certificate that may be issued in future in respect of the properties in question.

The Writ Petition is, accordingly, dismissed with costs of Rs. 25,000/- payable to the third respondent.