
(1989) 10 KL CK 0066
In the High Court Of Kerala
Case No : AS No. 380 of 1982

Savithri Ammal Vilasim Ammal APPELLANT
Vs
Jayaram Pillai Padmwathi Amma RESPONDENT

Date of Decision : 12-10-1989

Acts Referred:

Citation : (1989) 2 KLJ 709

Hon'ble Judges : V. Sivaraman Nair, J;P.K. Shamsuddin, J

Bench : Division Bench

Advocate : T.P. Kelu Nambiar and P.G. Rajagopalan, for the Appellant; R. Krishnan Nair and R. Sivadasan, for the Respondent

Final Decision : Dismissed

Judgement

Sivaraman Nair, J.—Defendants 1 and 2 in O. S. No. 90 of 1979 of the Sub Court, Pathanamthitta are the appellants. In that suit the respondent sought a decree setting aside Ext. A1 sale deed dated 8-12-1978, issue of permanent injunction against the defendants -- the appellants herein, and recovery of possession from them of the suit property with mesne profits. The lower Court decreed the suit enabling the plaintiff /respondent to recover possession from the appellants together with mesne profit at the rate of Rs. 1,500/- per annum till recovery. Hence this appeal. The facts which are necessary to appreciate the rival contentions are the following. The husband of the respondent, deceased Jayaram Pillai, got 11.95 Acres of land in Sy. No. 906/1-7 of Kunnathur Village as per partition deed No. 60848 of 1123. He assigned 2.25 acres out of that property under Ext. B2 document to the first defendant. 1.41 Acres of to the west of that land is the Suit property. Sri Jayaram Pillai died on 31-12-1976. His widow - the respondent - and her minor child were in enjoyment of the suit property since then. This first appellant's husband Gopalakrishna Pillai: represented, to the respondent that the Thandaper in respect of 2.25 acres covered by Ext. B2 sale deed still remains in the name of the late husband of the respondent and it was necessary to have the thandaper transferred to the name

of the first appellant by executing a document, for which purpose she was required to go to the Sub Registry Office, Pathanamthitta on 8-12-1978. Believing that representation to be true; the respondent/plaintiff went with the first appellant and her husband and signed Ext. A1 document which had already been prepared: She did not realise at that time that she was executing a sale deed in respect of the suit property. She was led to believe that the document which she was signing related to transfer of thandaper in respect of the property covered by Ext B2. There was no consideration for the sale. The respondent, after the death of her husband, was depending on the assistance of a few relatives. The suit property was looked after on her behalf by her sister Smt. Kamalakshy Amma. When she went to the suit property on 10-12-1978 to sell rubber sheets, the first appellant told her that Ext. A1 was a sale deed and the respondent has no right in the suit property. The respondent realised this position only at that time. She went to the office of. the Sub Registrar at Pathanam thitta along with her sister immediately and obtained a copy of Ext. A1 and found that it was a sale deed which she. had executed on the basis of a representation of the first appellant and her husband that it was a document intended only to transfer of thandaper in respect of the land covered by Ext. B2 into the name of the first appellant. The suit was instituted on 5-1-1979. The Respondent pleaded that Ext. A1 document in respect of the suit property was obtained on the basis of a fraudulent representation by exploiting her ignorance. It was, therefore that she sought a decree setting aside Ext. A1 sale deed, and a permanent injunction and recovery of possession with mesne profits. On 14-12-1978 the first defendant sold the suit property along with 2.25 acres covered by Ext. B1 document to the 2nd defendant. The respondent plaintiff filed I.A. 452/81 to implead the 2nd appellant as additional 2nd defendant. That application was allowed by order dated 9-1-1981.

2. The first defendant contended that Sri Jayaram Pillai had actually transferred 3.66 acres of land inclusive of the suit property to the first defendant under Ext. B2 sale deed and that she was in possession and enjoyment of the entire holding. The description of the property in Ext. B2 document was 2.25 acres or more, and the western boundary was stated to be the land which Sri Jayaram Pillai had sold to one Sri Shamsuddin and Sri Bhaskaran Nair. The suit property consisting of 1.41 acres in extent formed part of the property described in Ext. B2 and is within the western boundary described thereunder It was her case that Ext. A1 document was insisted upon, because the 2nd defendant insisted upon transfer,of thandaper in the name of the first defendant if the proposed transaction of 3.66 acres was to take place. It was in those circumstances that the husband of the first appellant approached the respondent who willingly agreed to transfer her right in the property for a consideration of one hundred rupees which was paid prior to 8-12-1978. According to the first appellant, the respondent went to the Sub Registry office on her own and signed the document only after she had read the same. She signed her name on her own evidencing that she was literate. This constituted the defence of the first defendant. The 2nd

defendant in his written statement supported the case of the first defendant and added that he had purchased the plaint schedule property together with the property covered by Ext. B2 document for a value of Rs. 20,000/- and that he was in possession and enjoyment of the properties.

3. The plaintiff examined herself and her sister as witness and produced Ext. A1 document dated 8-12-1978. The sole witnesses examined on the side of the defence was the husband of the first appellant. Exts. B1 to B7 were produced on the side of the defendants.

4. The trial court found that Ext. A1 document which was the same as Ext. B3, was obtained by fraud and mis-representation which the first defendant and her husband DW. 1 had practised on the respondent. The court also found that if the first defendant was right in her case that what she obtained under Ext.B2 document was really 3.66 acres, there was no need for her to obtain Ext.A1 document. The Court also relied heavily on a positive admission made by DW. 1 that his representation to the respondent was that the execution of Ext. A1 deed was required for the change of thandaper for the land already sold by her husband to the first defendant under Ext.B2 document. Reliance was also placed on the admission of DW. 1 that Ext. A1/B3 was executed only for the transfer of thandaper of the land covered by Ext. B2 sale deed. The trial court found that on a reading of Ext. A1/B3 it was evident that it was not a deed for transfer of any thandaper right, but a sale deed evidencing outright sale of 1.41 acres of land and of the rights accrued to the respondent after the death of her husband. The value of the sale as per Ext A1. was only a paltry sum of Rs. 100/-. The trial court found that these circumstances showed that Ext. A1 was obtained by fraud and mis-representation since the property measuring 1.41 acres could not have been sold away for the meagre sum of Rs. 100/- as consideration. The Court, therefore, held that Ex. A1 was a fraudulent document and the same was liable to be set aside. On the other relevant issues the court found on the evidence of DW. 2 who was managing the properties that the mesne profit in respect of the suit property was Rs. 1, 500- per annum. It was, therefore, that the court ordered recovery of possession of the suit property with mesne profit at the rate of Rs. 1500/- per annum from 10-12-1978 till recovery.

5. Counsel for the appellants submitted, that the trial court erred in finding that Ext. A1 document was vitiated by fraud and mis-representation. According to him, there would not have been any need for a sale deed in the nature of Ext. A1 because the boundaries described in Ext. B2 document took in the suit property as well. It is his case that the extent of 2.25 acres mentioned Ext. B2 document cannot be determinative and that the inference of fraud could not have been drawn from the only circumstance that the respondent executed Ext. A1 document which would not have been necessary in view of the recitals contained in Ext. B2 and the further fact the Western boundry of the property scheduled to that document took in the suit property as well. He submitted that a mere suspicion of impropriety cannot justify a finding of fraud. According to him, the

court could have found fraud as vitiating Ext. B1 document only if there was proof beyond reasonable doubt. He relied on the decisions reported in *Union of India (UOI) Vs. Chaturbhai M. Patel and Co.*, and *MMRM Chettiar Firm v. SRMSL Chettar* (1941 Privy Council 93). Reliance was also placed on the recital contained in Ext. B2 document that, to sustain his submission that the parties intended to convey more than" 2.25 acres. He submitted further that in a case where the extent of the area mentioned in the document and the boundaries differ, the latter should prevail. Reliance was placed on the decisions reported in *P. K. A. B. Co. op. Society v. Govt, of Palestine* (48 Privy Council 207) *Krishnan v. Mathai* (1957 KLT 42), *Krishnamurthy Iyer v. Janaki Amma* (1957 KLT 886) and *Parameswara Menon v. Gowrikutty Amma* (1984 KLT SN 65).

6. We are satisfied that the trial court has taken into consideration the rule of caution that the finding of fraud as vitiating a document should not be lightly rawn. The pleadings and the evidence indicated that DW. 1 the husband of the first appellant had made a representation to the respondent that it was necessary to execute a registered document so as to enable the first defendant to obtain transfer of Thandaper in her favour. In his examination as DW. 1 he bad stated positively that that was a representation which he had made to the plaintiff. PW. 1 had positively asserted that but for the representation that what she was required to execute was a document enabling the transfer of thandaper in respect 2.25 acres of land covered by Ext. B2 document," she would not have executed Ext.A1. It is, of course true, that she was literate, had written her name in the document and had signed in English. Those factors by themselves would not justify an inference that she had read the document before she signed the same. She was a hapless widow with a minor girl and her only sister to assist her on occasions. According to the defendants, her deceased husband had not left any property to her where as the respondent/plaintiff maintained that she was eking her livelihood out of the income from the sail property and the charity of some of her relatives.

7. Counsel for the appellants submitted that it is difficult to believe that the plaintiff/respondent would have readily signed Ext.A1 document without reading the same only on the basis of the representation made by the first defendant and her husband whom she had not known previously. On a scrutiny of the evidence of PW. 1 and DW. 1. we are inclined to agree with the trial judge that the plaintiff respondent was not in a position to assert her will and was led away by the representation of the husband of this first defendant that she should execute a document so as to enable transfer of Thandaper in respect of the land covered by Ext. B2 document to the name of the first defendant. We are satisfied that the lower court was justified in relying upon the evidence and circumstances as sufficient proof beyond reasonable doubt to base his finding that the plaintiff respondent executed Ext. A1 entirely on the basis of the fraudulent representation that what she was signing was not a sale deed. Needless it is for us to state any further. PW. 1 was positive that but for the fraud practised by DW. 1 on her, and had she known that Ext.A1 was a sale deed in respect of the only

remaining. land left to her and her minor child by her husband, she would not have executed Ext. A1 document at all. The trial court was fully justified in relying on the admission of DW. 1 and the assertions of the plaintiff as PW. 1 as sufficient proof to justify a finding of fraud.

8. In cases where there is a difference in the extent and the boundary covered by a document, one or the other which is clearer and more specific has to be preferred. In some cases it may be the boundary. In some other cases it may be the extent and in yet other cases it may be the side measurements. There is no invariable rule in this regard. None of the decisions on which the appellants rely has held positively that in all cases of such conflict the boundary alone shall prevail. On the other hand, in Krishnamurthy Iyer's case (1957 KLT 886) Kumara Pillai, J. held that.

"The usual rule is that when there is a conflict between the area and the boundaries the description of the boundaries should be accepted in preference to the area mentioned in the document for determining the extent of the land conveyed thereunder. This is not an inflexible rule. When from the proved circumstances it is clear that the intention of the parties was only to convey the extent mentioned in the document, even though the boundaries would take in a larger area, effect has to be given to then intention and the description of the boundaries cannot be allowed to prevail."

Varadaraja Iyengar, J. in Krishnan v. Mathai (1957 KLT 42) held that:-The evidence supplied by boundaries, extent, survey numbers and lekhoms form the determining factors when the identity of the property is put in issue. If all these factors harmonised there is little difficulty to identify the property in dispute But when some of them are in conflict with the rest as when the extent and survey numbers do not agree with the boundaries usually the boundaries predominate and the rest is regarded as erroneous or inaccurate descriptions. This is not an inflexible rule and the guiding principle is to apply that test which is most unlikely to be vitiated by error".

The same question, came up for consideration before Bhat, J. in E. S. A. 10 of 1979. After reference to a number of decisions- Zamtndar of Pachipenta v. Maharaja of Jeypore (23 M. L.J. 97), Subbayya Chakkiliyan Vs. Manjam Muthia Goundan and Another, , Durga Prasad Singh v. v. Rajendran Narain Bageni ILT 37 Cal. 293, Kumaran Krishnan v. Ulahannan Mathai (1957 KLT 42), Chacko Joseph v. Varghese Markose (1957 KLT 485), Savarimuthu Nadar Chellyan Nadir v. Kanakku- Kali Pillai Padmanabha Pillai (1957 KLT 825) and Krishnamurthy Iyer v. Janaki Amma (1957 KLT 886), he observed that:

"No doubt, the court will at first try to reconcile the various descriptions if that be not possible, one or more of the descriptions may have to be rejected and the decision rested only on the other description or descriptions. When one of the descriptions is vague and uncertain and another description is definite and certain, the latter may be preferred. If none of the descriptions is vague or

uncertain, that description which is more certain and stable and least likely to have been mistaken or inserted inadvertantly must be preferred if it sufficiently identifies the subject matter of the transaction and the other descriptions must be rejected as erroneous or inaccurate. This is not a rule of law and therefore is not inflexible in character: it is a mere rule of construction which appears to be safe and almost an infallible guide."

The same principle was adopted by P. C. B. Menon, J. in the decision in Parameswara Menon's case 1984 KLT SN 65--S. A. NO 684/80.

It is true that in that case the Court found that the boundaries mentioned, in the document should prevail over the inconsistent side measurement. We understand the law to be as laid down in decisions referred to by Bhat, J. and which we have extracted above. The rule is only one of construction. It is note unalterable, inflexible or invariable. We will examine the case of the appellants on the assumption that the western boundary, mentioned in Ext. B2 document took in the suit property as well and the intention of the transferer was to convey not only 2, 25 acres because he had specifically mentioned in the schedule itself. If what was transferred to the first defendant was 3.66 acres in view of the above "circumstances, it would not have been impossible for her to prove the same; nor would there have been any need for the first appellant to obtain a document in the nature of Ext. A1. If Ext. B2 itself conveyed to her 3.66 acres of land including the suit property and that was authorised by the description of the boundaries and the mention of in the schedule attached to Ext. B2, why did she go for another document-Ext. A1-on the representation that it was necessary to obtain transfer of thandaper? DW. I was positive in his evidence that 3.66 acres of land was conveyed to the first defendant under Ext.B2, that the very document would have enabled transfer of patta of the entire land including the suit property on the basis of the description of boundaries and the mention of in the schedule attached to that document. If that be the position there was no need for obtaining a document in the nature of Ext.A1 from the plaintiff/respondent. This conduct of the first defendant/appellant who was the transferee under Ext.B2 makes it absolutely clear that but for Ext.A1 document, she would have had title only over 2.25 acres of land and not to the suit property. In spite of the inconsistency in the recitals contained in Ext B2 document between the area and the boundaries, the transferee thought that she required another document to evidence transfer of 1.41 acres more to her. The finding of the lower court that the first defendant obtained Ext. A1 document on the basis of fraud and misrepresentation cannot but be sustained. It is clear that the defendants were not misled by the mention of the western boundary in Ext.B2 document. The conduct of the 1st defendant as spoken to by D.W1 clearly evidences that they were aware that it took in only 2.25 acres and excluded the suit property in spite of the recitals contained in the document. None of the decisions referred to above will be of any avail to the appellants in view of the conduct of the first appellant and her husband for the period preceding Ext.A1 document.

In this view, we are of the opinion that the trial court was right in its findings. The judgment and decree of the lower court are, therefore, affirmed. The appeal is dismissed with costs.