

(2011) 06 KL CK 0128
In the High Court Of Kerala
Case No : OP (C) No. 1612 of 2011 (O)

V.P. Mammad Koya

APPELLANT

Vs

Muthoor Leasing and Finance Ltd., M. Abdul Rasheed and K.T.
Zakeer Hussain

RESPONDENT

Date of Decision : 02-06-2011

Acts Referred:

Citation : (2011) 06 KL CK 0128

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

Bench : Single Bench

Advocate : Babu S. Nair, for the Appellant; C.S. Manilal, for the Respondent

Final Decision : Dismissed

Judgement

K.T. Sankaran, J.—The Petitioner is the second Defendant in O.S. No. 126 of 1999 on the file of the Court of the Subordinate Judge of Kozhikode. The suit was filed by the first Respondent for realisation of money due under a hire purchase agreement. The second Respondent is the principal borrower. The Petitioner and the third Respondent are guarantors.

2. The suit was decreed exparte on 20.9.2000. The Petitioner filed I.A. No. 5232 of 2005 to set aside the exparte decree. I.A. No. 5231 of 2005 was filed for condonation of the delay of five years and 23 days in filing the application to set aside the exparte decree. The trial court dismissed the application for condonation of delay and consequently, the application for setting aside the exparte decree was also dismissed. The Petitioner filed C.M.A. No. 77 of 2006 before the District Court, Kozhikode challenging the orders passed by the trial court. The Appellate Court dismissed C.M.A. No. 77 of 2006 by the judgment dated 11.10.2007, which is under challenge in this Original Petition.

3. The contention put forward by the Petitioner is that he is V.P. Mammed Koya, whereas the cause title in the suit would disclose that the second Defendant is V.P. Muhammed. The Petitioner contended that he did not receive any summons

in the suit. He came to know of the decree only when he received notice in the execution proceedings.

4. The court below rejected the contentions put forward by the Petitioner. On a careful perusal of the suit records, the court below held that summons was served on the second Defendant. The second Defendant was described as son of Moosa. It was also found that the house name and postal address are the same as that of the Petitioner. There is no case for the Petitioner that apart from him, there is another son for Moosa by name V.P. Muhammed. The court below also noticed that an advocate proposed to file vakalath for the second Defendant in the trial court. As an advocate proposed to vakalath for the second Defendant, the suit was posted on different dates for the written statement of the second Defendant. However, no written statement was filed and the second Defendant was declared *exparte*. The suit was also decreed *exparte*. On the above findings, the court below held that there is no merit in the contentions put forward by the Petitioner. Accordingly, C.M.A. No. 77 of 2006 was dismissed.

5. On a careful consideration of the facts and circumstances of the case and on a perusal of the order passed by the trial court and the judgment rendered by the lower Appellate Court, I do not find any ground to interfere with the concurrent decisions of the courts below. There is no illegality, irregularity or error of jurisdiction warranting interference. The Original Petition is, accordingly, liable to be dismissed.

6. The learned Counsel appearing for the Petitioner submitted that the decree holder has filed an Execution Petition, in which, the residential property belonging to the Petitioner is proclaimed for sale. The sale is scheduled to be held on 9.6.2011. Learned Counsel submitted that a direction may be issued to the executing court not to proceed against the Petitioner before proceeding against the principal debtor. In the course of arguments, certain suggestions emerged as to the payment of the decree amount in three instalments. Sufficient time was granted to the learned Counsel to contact the Petitioner. On specific instructions from the Petitioner, the learned Counsel submitted that the Petitioner is prepared to deposit before the executing court, on or before 30.6.2011, a sum of Rs. 2,50,000/- (Rupees Two lakhs and fifty thousand) for payment to the decree holder. The counsel also submitted that the balance of the decree amount would be paid in two monthly instalments. The learned Counsel appearing for the decree holder submitted that the decree holder has no objection for the same.

Accordingly, the Original Petition is disposed of as follows:

a) The challenge against the orders in I.A. Nos. 5231 of 2005 and 5232 of 2005 in O.S. No. 126 of 1999 and the judgment in C.M.A. No. 77 of 2006 fails. Accordingly, the Original Petition is dismissed in so far it relates to the challenge against the same.

b) The Petitioner is permitted to pay the decree amount in three instalments. The first instalment of Rs. 2,50,000/- (Rupees Two lakhs and fifty thousand) shall be

deposited before the executing court, for payment to the decree holder, on or before 30.6.2011. The balance of the decree amount shall be deposited by the Petitioner in two equal monthly instalments, on or before 31.7.2011 and 31.8.2011.

c) In case of default of payment of any of the three instalments mentioned above, the entire balance decree amount shall become due forthwith and the execution proceedings would be proceeded with.

d) In case the execution proceedings are to be proceeded with as mentioned above, the sale shall be held on the same sale proclamation. The Petitioner waives fresh proclamation.