

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 31ST DAY OF AUGUST 2015/9TH BHADRA, 1937

CRP.No. 37 of 2010 ()

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AGAINST THE ORDER IN E.P.NO.34/2008 IN OS 72/2007 of SUB COURT,
PERUMBAVOOR DATED 06-11-2009**

REVISION PETITIONER(S)/JUDGMENT DEBTORS 1 & 2:

**1. BHARGAVI, W/O. SRI. LATE MOHANAN,
MANGALATH VEETIL, RAYAMANGALAM VILLAGE
PULLUVAZHI KARA.**

**2. BINU, S/O. LATE MOHANAN,
-DO- -DO-**

BY ADV. SRI.DINESH R.SHENOY

RESPONDENT(S)/DECREE HOLDER & JUDGMENT DEBTORS 3 & 4:

**1. VELAYUDHAN, S/O. PARAMESWARAN,
THEKKEKUTTUVEETIL HOUSE, PUTHUVELI KARA
VELIYANNOOR VILLAGE, KOOTHATTUKULAM P.O. (DIED, LRS IMPEADED)**

**2. MEERA MOHAN, D/O. LATE MOHANAN,
MANGALATH VEETIL, RAYAMANGALAM VILLAGE
PULLUVAZHI KARA, PERUMBAVOOR.**

**3. MOBI MOHAN, D/O. LATE MOHANAN,
-DO- -DO-**

**ADDL.R4. INDIRA VELAYUDHAN, W/O. LATE VELAYUDHAN,
THEKKEKUTTUVEETIL HOUSE,
PUTHUVELI KARA, VELIYANNOOR VILLAGE,
KOOTHATTUKULAM P.O.**

**ADDL.R5. ANEESH, S/O. LATE VELAYUDHAN,
THEKKEKUTTUVEETIL HOUSE,
PUTHUVELI KARA, VELIYANNOOR VILLAGE,
KOOTHATTUKULAM P.O.**

**ADDL.R6. AMBILI, D/O. LATE VELAYUDHAN,
DO. DO.**

**(ADDL. RESPONDENTS 4 TO 6 ARE IMPEADED AS THE LEGAL HEIRS OF THE
DECEASED R1 AS PER ORDER DATED 31.08.2015 IN I.A. 2578/2011)**

**R1 TO ADDL. R5 BY ADV. SRI.G.RAJAGOPAL
R1 BY ADV. SMT.N.RENJINEE DEVI
R2 AND R3 BY ADV. SMT.N.ANJALI**

**THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON
31-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

P.BHAVADASAN, J.

C.R.P. No. 37 of 2010

Dated this the 31st day of August, 2015

ORDER

Aggrieved by the order dated 06.11.2009 in E.P.No.34/2008 in O.S.No.72/0007, the judgment debtors 1 and 2 have come up in revision.

2. The predecessor-in-interest of the petitioners borrowed amount from the first respondent herein and he instituted O.S.No.72/2007 against the judgment debtors for realization of an amount of ₹3,92,059/-. After trial, a decree was passed for a sum of ₹2,98,720/- with 6% interest on suit amount from the date of suit till realization. The decree specified that the legal heirs of the original debtor will be liable only to the extent of asset inherited by them consequent on the death of the original judgment debtor.

3. It appears that execution was taken out by the decree holder. The judgment debtors entered appearance and resisted the claim. It was pointed out that the judgment

debtors had received only an amount of ₹3,16,181/- as pensionary benefits of the deceased. The amount so received has been utilized for discharging other debts incurred by the deceased. No further amount or assets belonging to the deceased is available with the legal heirs of the deceased. It was also contended that the property attached in execution was the property belonging to the first judgment debtor which she had purchased using her own funds. Since no assets of the deceased remain with the judgment debtors, the decree holder has no right to proceed against them to realize the amounts due from the deceased.

4. On the above pleadings, issues were raised and the parties let in evidence. The evidence consists of the testimony of PW1 from the side of the decree holder. The judgment debtors examined DW 1 to 9 and had Exts. B1 to B10 marked.

5. The court below accepted the payments made by way of Exts. B2, B2(a) and B3 as lawful discharge of debts

incurred by the deceased, but rejected the claim of satisfaction of the debt covered by Exts.B5 and B6. The court below also accepted the payment made as per Ext.B7. Even though the judgment debtors were able to produce Ext.B4 which shows that gold pledged by the deceased was redeemed by utilizing his pensionary benefits, the court below held that there were no case for the judgment debtors that the gold ornaments belonged to them and it should therefore be presumed that the ornaments belonged to the deceased and if that be so, that asset has come to the hands of the judgments debtors and they are liable to account for the same. As regards the payment awarded by Ext. B1 is concerned, the court below for cogent reasons found it difficult to accept the payment claimed to have been made by virtue of Ext.B1 series of documents amounting to ₹1 lakh. Therefore, the court below directed that the judgment debtors are liable to clear off the decree debt to the extent of property left with them of the deceased and accordingly,

passed the impugned order.

6. The question that arises for consideration is whether any interference is called for with the order of the court below. This Court is called upon to exercise its revisional powers under Section 115 of C.P.C.. Section 115 of C.P.C. reads as follows:

“115. Revision.-- (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears--

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

(3) A revision shall not operate as a stay of suit or other proceeding is stayed by the High Court.”

7. If only any one of the grounds mentioned in the above provision is made out, an interference under Section 115 of C.P.C. is warranted. If this Court is unable to find any illegality, irregularity or impropriety in the order of the court below, certainly no interference is called for.

8. It is not disputed that the original debtor was no more at the time of institution of the suit and the suit was laid against his legal representatives. Then they suffered a decree. It is also not in dispute that even though a sum of ₹4 and odd lakhs was initially claimed to have been received as benefits of the deceased, at the time of execution, DW1 gave evidence to the effect that the amount actually received is only ₹3,16,181/- which was accepted by the court below. The judgment debtors sought to justify the utilization of the amount by virtue of the payment through Exts. B1 series, B2 series and B3 to B7 documents. Exts.B1, B1(a)

and B1(b) are three payments said to have been made totaling to ₹1 lakh towards a debt due to DW8 who is conducting a financial concern at Perumbavoor. It is seen that the deceased had borrowed a sum of ₹1,50,000/-. The claim made by the judgment debtors was that by virtue of Exts. B1, B1(a) and B1(b), they had paid ₹50,000/-, ₹20,000/- and ₹30,000/- respectively towards discharge of debt. However, the lower court has noticed that there is correction in the dates of the receipts and even though DW1 claimed that the correction was made by the owner of the financing concern, DW8, the owner disputed the said fact. It is significant to notice that the deceased had admittedly executed a voucher at the time of receiving the document and that voucher was not got produced through DW8. DW8, in fact, in court deposed that the voucher is still with him and that the lower court has noticed that even going by the evidence, still an amount of ₹2,50,000/- is outstanding. For want of cogent and convincing materials and evidence in

that regard, the court below rejected the claim made as per Exts.B1, B1(a) and B1(b).

9. One need not dwell much about the payments made by Exts.B2 B2(a), B3, and B7, since those are not challenged by the decree holder and those payments have been accepted by the Execution Court. What is left are Exts.B4, B5 and B6.

10. The judgment debtors had a case that the deceased had pledged gold worth more than ₹90,000/- with the Syndicate Financiers. DW4 was examined for establishing the said fact. It is seen from Ext.B4 dated 22.11.2008, an amount of ₹90,474/- have been made. DW4 admitted that the gold loan has been closed and ornaments have been redeemed.

11. The lower court has taken note of the fact that there was no case for the judgment debtors that the gold ornaments belonged to any one of them and if that be so, the presumption is that the gold ornaments belonged to the

deceased and if that be so, on redemption, they have acquired the assets which belonged to the deceased. To that extent, they are liable.

12. The reasoning of the court below seems to be sound. As long as the judgment debtors have no case that the gold ornaments belonged either to the first judgment debtor or other judgment debtors, it will be deemed to be an asset belonging to the deceased and on redemption, the gold ornaments came to the hands of the judgment debtors for which they are liable to account. Since they are not able to account for the gold ornaments, they are liable for the value of assets so inherited by them from the deceased.

13. Exts. B5 and B6 have been found to be not acceptable by the court below. The court below found that there was no document evidencing the incurring of loan at the time when the payment was made, but receipts were issued at the time of repayment. That the court below found it to be suspicious and found it unsafe to rely on those

documents to accept the payment made by them.

14. It is to be seen that the amount paid by virtue of Exts.B5 and B6 are ₹55,000/- and ₹60,000/- respectively. It is difficult to believe that without any documents whatsoever, those amounts would have been given as loan to the deceased. Normally, if that be so, there would not have been any necessity to take receipts at the time of payments, since the payment itself was not evidenced by any documents. The court below therefore found it unsafe to rely on those two documents, there is no reason or justification to interfere with the said finding.

15. The learned counsel appearing for the respondents pointed out that even though the judgment debtors may be legally entitled to clear off the debts of other creditors if the judgment debtors were aware of the debt due to the petitioner, it amounts to a fraud. For the said purpose relied on decision reported in **G.F.F. Foulkes and others v. A.S. Suppan Chettiar and another** [AIR (38) 1951 Madras 296]

wherein, it was held as follows:

“There is, however, an exception to the general rule stated above. If the creditors, who have been paid in full or in excess of their shares, knew that the administrator, who occupied a fiduciary position towards the creditors of the estate including the beneficiaries, was acting in violation of his trust and in fraud of those interested in the due administration of the assets, the fraud vitiates the transaction and must hold the excess amount for the benefit of unsatisfied and unpaid creditors.”

16. There can be no doubt that the judgment debtors who inherit the estate of the deceased stands in a fiduciary capacity and they are expected to discharge such duties as if a trustee.

17. The learned counsel for the respondents pointed out that the majority of the payments have been made after the notice has been issued and after the first judgment debtor was fully aware of the debt due to the decree holder.

18. Even though the judgment debtors may be entitled in law to discharge the debts, they will have to offer satisfactory explanation as to why the debt of the decree holder was not taken note of. Whatever that be, the court below has found that certain portion of the assets left behind by the deceased are in the hands of the judgment debtors for which they are unable to account. If that be so, they are liable to that extent.

19. This Court is unable to find any irregularity, illegality or impropriety in the order and this order perverse from no palpable errors. This revision is without merits and it is accordingly dismissed.

20. During the pendency of C.R.P. the first respondent that is the decree holder died and his legal heirs have been impleaded as additional respondents 4, 5 and 6. This Court is informed that as per the orders of this Court dated 02.06.2010, this Court had directed the judgment debtor to deposit a sum of ₹ 50,000/- for payment to respondents

before the Executing Court. If the said amount has been deposited, the decree holder is at liberty to withdraw the same.

The parties will appear before the court below for other proceedings on **28.09.2015**.

Sd/-
P.BHAVADASAN
JUDGE

ds

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P.A. to Judge