

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 7TH DAY OF JULY 2015/16TH ASHADHA, 1937

EX.SA.NO. 14 OF 2015

AGAINST THE JUDGMENT IN AS 41/2015 OF ADDITIONAL DISTRICT COURT- I,
MAVELIKKARA DATED 10-04-2015
AGAINST THE ORDER IN E.A.NO.181/14 IN EP.NO.252/12 IN OS.NO.3/12 OF SUB
COURT, MAVELIKKARA DATED 03-02-2014

APPELLANT/APPELLANT/EXECUTION APPLICANT:

AMMINI, AGED 43 YEARS
W/O. DASAN, ULLARAKKAL HOUSE, KOTTARAVALLAVU
KARUVATTA NORTH MURI, KARUVATTA VILLAGE.

BY ADVS.SRI.RINNY STEPHEN CHAMAPARAMPIL
SMT.ASHA ELIZABETH MATHEW

RESPONDENTS/RESPONDENTS/RESPONDENTS:

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- 1. BINU J NALPATHANJIL, AGED 45 YEARS,**
S/O JOSEPH, NALPATHANJIL HOUSE, PAMANKARI HOUSE
RAMANKARI VILLAGE, KUTTANAD TALUK-688 002.
 - 2. JOSEPH PALATHARAYIL, AGED 42 YEARS,**
S/O LARI JOSE, PALATHARAYIL HOUSE, PUNNAPRA
PARAVOOR VILLAGE, AMBALAPUZHA TALUK-688 001.

R1 BY ADVS. SRI.MOHAN JACOB GEORGE (CAVEATOR)
SMT.P.V.PARVATHI (CAVEATOR)
SMT.REENA THOMAS (CAVEATOR)

THIS EXECUTION SECOND APPEAL HAVING COME UP FOR ADMISSION ON
07-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AS

A.HARIPRASAD, J.

Ex.S.A.No.14 of 2015

Dated this the 7th day of July, 2015

J U D G M E N T

The second appeal is against the judgment and decree in A.S.No.41 of 2015 on the file of the Additional District Judge-I, Mavelikkara. The matter came up before the lower appellate court from an order passed by the executing court on E.A.No.181 of 2014 in E.P.No.252 of 2012 in O.S.No.3 of 2012. The suit was one for specific performance of an agreement. The appellant filed a petition under Section Order 21 Rule 99 and Rule 104 CPC r/w Section 47 CPC.

2. Heard the learned counsel for the appellant and learned counsel for the contesting respondent.

3. The specific questions of law put forward by the appellant are thus:

- (i) Whether the lower appellate court is legally justified in holding that an application under Order 21 Rule 99 CPC is maintainable only after the person in possession was dispossessed?

(ii) Whether the lower appellate court is legally justified in holding that appeal is not maintainable since adjudication under Order 21 Rule 100 CPC takes place only on an application filed by a person who is dispossessed in execution of a decree.

4. The relevant facts admitted by both sides are as follows: The contesting respondent obtained a decree for specific performance of a contract against the other respondent in this proceedings. Pursuant to the decree, a sale deed was also executed in the name of the contesting respondent through the intervention of the trial court. When that property was sought to be taken delivery of, the appellant resisted and came forward with a petition under Order 21 Rule 99 and Rule 104 CPC and also under Section 47 CPC. That matter was considered by the trial court at length. The contention raised by the appellant in the petition is that she was put in possession of the property by the second respondent in this appeal by virtue of an agreement to sell after receiving more than ₹4 lakhs towards the consideration. It is her case that she

keeps possession of the property in part performance of the contract and she is entitled to get the protection under Section 53A of Transfer of Property Act (in short 'the TP Act'). Executing court noticed that no agreement was produced by the appellant to substantiate her contention. More over, the agreement alleged to have been executed by the second respondent in this appeal in favour of the appellant was in the year 2011. Admittedly, it was not a registered agreement to assign. On account of the amendment to Section 53A of TP Act and section 17 of the Registration Act, the appellant is legally precluded from claiming any right under Section 53 A of TP Act by raising a claim that she was put in possession and keeps the same by virtue of part performance. This contention was repelled by the executing court. The matter was taken up to the lower appellate court. The lower appellate court dismissed the appeal mainly for two reasons. Firstly, the appellant could not have taken recourse to a proceeding under Order 21 Rule 99 CPC before she was dispossessed from the property. Second reason stated by the lower

appellate court is that as the application itself was not maintainable and the appeal was also incompetent.

5. Order 21 Rule 99 CPC reads as follows:

Dispossession by decree-holder or

purchaser:-(1) *Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree by the purchaser thereof, he may make an application to the Court complaining of such dispossession.*

(2) *Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.*

6. Learned counsel for the appellant placed reliance on a decision of the Supreme Court in **Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Another** (AIR 1997 SC 856). The following observations in the said decision are relied on by the court below:

“Once such an obstruction is one the record of the Executing Court it is difficult to appreciate

how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under O.21 R.99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to stranger to the decree who claims any independent right, title or interest in the decretal property is to go by O.21 R.99. This view of the Hight Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualious that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per O.21 R.99. O.21 R.97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree holder. While O.21 R.99 on the other hand deals with the subsequent stage in the

execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors the interest of the judgment debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of O.21 and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him with respect the High Court has totally ignored the scheme of O.21 R.97 in this connection by taking the view that only remedy of such stranger to the decree lies under O.21 R.99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the

obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non compliance with basic principles of natural justice."

7. It was argued on the basis of the above observation that the lower appellate court should not have dismissed the appeal finding that the appeal was premature. In answer to this argument, counsel for the contesting respondent relying on a Division Bench decision of this Court in **Unnikrishnan v. Kunhibeevi**

[2011 (1) KLT 508] contended that the decision in **Brahmdeo Chaudhary** (supra) has been understood by this court in the following terms:

“The Apex Court again in Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal (AIR 1997 SC 856) reiterating the principles laid down in Bhanwar Lal's case (cited supra) set at rest all controversies as to whether an obstructer resisting a decree for possession as being a stranger to such decree has the right to approach the court executing that decree before his dispossession. It has been held that such stranger can agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even prior to his dispossession. Pointing out that O.XXI R.97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree holder, and O.XXI R.99 contemplates with a subsequent stage where a stranger after dispossession in execution of the decree seek adjudication of his independent right, title and

interest over the property delivered over, the Apex Court held that both types of enquiries are clearly contemplated by the scheme of O.XXI and "it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing his possession and not before."

8. Learned Single Judge of this Court in **Kuruville v. Michael and Another** [2011 (2) KHC 34] has taken the same view. Learned Single Judge has observed that it is now well settled that even before the delivery, the obstructor is entitled to apply before the executing court for adjudication of his rights over the property. After delivery, Rule 99 of Order 21 enables a stranger who claims right over the property to make an application to the court complaining of such dispossession.

9. Learned counsel for the appellant contended that the court below dismissed the appeal without appreciating the evidence adduced before the executing court. According to him, if the application filed under Order 21 Rule 99 CPC was found to be not maintainable,

the court should have considered it as an application under Order 21 Rule 97 CPC. This submission is opposed by the learned counsel for the contesting respondents by contending that no ground is taken in the appeal memorandum regarding the non consideration of issue under Order 21 Rule 97 CPC. Even if one assumes that this contention can be raised at this stage of the proceedings without formulating a ground, I am of the view that the judgment of the lower appellate court cannot be found to be faulty for that reason. The basic case of the appellant is that she was put in possession of the property by virtue of an agreement to assign and she keeps possession in part performance of the agreement. It is mentioned in the order passed by the executing court that no agreement allegedly executed by the second respondent and the appellant was produced before the court. The legal infirmity in the contention is that benefit under Section 53A of TP Act cannot be claimed by the appellant on the basis of the so called agreement, for the sole reason that she has no case that it is a registered agreement. Even if

that contention was not separately considered by the lower appellate court, I find no legal infirmity attached to the impugned order.

10. Learned counsel for the contesting respondent contented that the appellant's claims, if at all accepted, will be only one under the right, title and interest of the judgment debtor. In that view also, it cannot be said that she has an independent claim.

11. Another contention raised by the appellant is regarding the observation of the court below that no appeal will lie against the order passed under Order 21 Rule 99 CPC. Rule 100 of Order 21 CPC r/w Rule 103 of Order 21 CPC, makes it clear that an order passed under Rule 100 shall have the same force and will be subject to the same conditions as to an appeal or otherwise as if it were a decree. If the petition under Order 21 Rule 99 was maintainable, certainly the order passed could only have come under Rule 100 of Order 21 CPC. The court below found that the application itself was not maintainable, still that will be an order passed under Rule 100 of Order 21

CPC. Therefore, I am of the view that the appeal against an order is maintainable.

Considering the entire facts and circumstances, I do not find any substantial question of law arising in this appeal warranting interference in this second appeal. Therefore, the appeal is dismissed.

Sd/-

A.HARIPRASAD, JUDGE.

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P.A. to Judge