

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.VASHA

MONDAY, THE 30TH DAY OF NOVEMBER 2015/9TH AGRAHAYANA, 1937

FAO.No. 182 of 2015

*(Against the order dated 25.6.2015 in I.A.3102/13 in O.S.No.70/13 on the file of the
Court of the Subordinate Judge (Addl) of Palakkad)*

APPELLANTS/PETITIONERS:

1. K.SANDHYA AGED 40 YEARS
W/O.BABY PRASAD, SREE PRASADAM VEEDU
VADAKKANTHARA DESOM, PALAKKAD DISTRICT.
2. SUCHITHRA AGED 39 YEARS
W/O S.JAYAKRISHNAN, JAYASREE VEEDU, KANAKI NAGAR
VADAKKANTHARA P.O., PALAKKAD.

BY ADVS.SRI.T.KRISHNANUNNI (SR.)
SRI.VINOD RAVINDRANATH
SMT.MEENA.A.
SRI.M.DEVESH
SRI.SAJU.S.A
SRI.K.C.KIRAN

RESPONDENTS/RESPONDENTS:

1. K.K.SIVAKUMAR, AGED 45 YEARS
S/O.K.S.KRISHNAN, SIVA VEEDU, THARAKAR LANE
KIZHAKKUMBURAM, ENNAKKOTTEL STREET, PALAKKAD
PIN: 678 001.
2. V.M.VIJAYALAKSHMI, AGED 67 YEARS
RESIDING AT SIVA VEEDU, THARAKAR LANE, KIZHAKKUMBURAM
ENNAKKOTTEL STREET, PALAKKAD, PIN: 678 001.
3. SAJINI, AGED 48 YEARS
W/O.K.BALAKRISHNAN, NEAR VALAMPIRI GANAPATHI TEMPLE
KARNAKI NAGAR, MOOTHANTHARA, VADAKKANTHARA
PALAKKAD 678 012.
4. SUNITHA, AGED 46 YEARS, W/O.K.SETHUMADHAVAN,
ASWATHY,KARNAKI NAGAR
VADAKKANTHARA, PALAKKAD, PIN: 678 012.

R1,R2,R4 BY ADV.SRI.P.B.KRISHNAN
R1,R2,R4 BY ADV.SRI.P.B.SUBRAMANYAN
R1,R2,R4 BY ADV.SRI.SABU GEORGE
R1,R2,R4 BY ADV.NEELAKANDAN.P.M.
R3 BY ADV. SRI.E.RAMACHANDRAN
R3 BY ADV. R.UMASANKAR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 30-11-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

F.A.O.No.182 of 2015

Dated this the 30th day of November, 2015

JUDGMENT

Antony Dominic, J.

The plaintiffs in O.S.No.70/2013 on the file of the Sub Court (Additional) Palakkad are the appellants. In this appeal, they are challenging order dated 25.6.2015 passed in I.A.No.3102/13. The said application was one filed under order 40 Rule 1 of CPC for the appointment of a Receiver and by the impugned order the IA was dismissed. It is this order which is under challenge.

2. We heard the counsel for the appellants and the learned Senior Counsel appearing for the respondent.

3. O.S.70/13, of which the appellants are the plaintiffs, has been filed seeking partition. According to the plaintiffs, A schedule property consists of 11 items, of which item Nos.1 to 7 belonged to Late K.S.Krishnan, father of the plaintiffs and defendants 1, 3 and 4 and the husband of the second defendant. It is also averred that item Nos.8 and 9 were jointly acquired by the plaintiffs and the defendants and that item Nos.10 and 11 were acquired by the first defendant with the income derived from item Nos.1

to 7. Plaint B schedule consisted of business goodwill, business, vehicles, capital contribution in a company, the amount paid towards membership in a club. The suit was resisted mainly by the first defendant, the brother of the plaintiffs, contending inter alia that after the death of K.S.Krishnan in 1994 itself, Ext.A1 partition deed was executed among the parties, by which, the plaintiffs had relinquished their claims over the plaint schedule properties against valid consideration received from him.

4. It was in that suit that the plaintiffs had filed I.A.3102/13 under Order 40 Rule 1 CPC contending inter alia that the first defendant was managing the properties as a co-owner taking care of the needs of the plaintiffs and the other defendants. It is also stated that since there was difference of opinion among the parties, the first respondent started to manage the properties on his own, without taking care of the interest of others. It was also alleged that he was misappropriating the income from the properties. It is stated that the plaintiffs came to know that the 1st defendant was planning to alienate some of the plaint schedule properties and that item No.4 in plaint A schedule is a 'kalyanamandapam' from which there is approximately an

annual income of 10 lakhs and the first respondent is accountable for the same.

5. This I.A. was also resisted by the first defendant, contending that the plaint schedule properties are his own and that the plaintiffs have no claim whatsoever over the properties. In the impugned order, the court below had referred to the contentions of both sides and in so far as Ext.A1, which is described as a document vitiated by fraud and void is concerned, the court below held that those contentions are to be taken into consideration at the final stage of the suit. The court took note of Ext.A1 document registered in 1994 and that the genuineness of the said document was sought to be impugned after a lapse of 18 years. It also considered the fact that there was no record whatsoever to show that the first defendant was sharing the income from properties with the plaintiffs or other legal heirs of the deceased. According to the court, there was nothing in the application to show that the properties are mismanaged by the first defendant or that he was planning to alienate the properties or is misappropriating the income from the properties. According to the court, in such a case, an order of appointment of Receiver also have the effect of dispossessing the first

defendant from the plaint schedule properties and that such an order cannot be passed.

6. The learned counsel for the appellants contended that Ext.A1, being a void document, is only to be ignored and that once Ext.A1 is ignored the plaint schedule properties acquire the character of co-ownership properties. According to her, when such properties and the income therefrom are found to be misappropriated and apprehended to be alienated, the co-owners are entitled to an order of receivership so that the person in possession will be accountable to the court and to the co-owners. However, this contention was refuted by the learned Senior Counsel for the first defendant. According to him, no circumstances whatsoever made out by the appellants for an order appointing a receiver.

7. We have considered the submissions made by both sides. It is true that under Order 40 Rule 1, the court is entitled to appoint the receiver in respect of the plaint schedule properties. However, that does not mean an order of appointment of receiver, which having very serious consequence in so far as the persons involved are concerned, is to be passed on the mere asking of it. Therefore, the courts have

indicated the circumstances to be established by a party seeking an order of receivership. In the judgment of the Madras High Court in **T.Krishnaswamy Chetty v. C.Thangavelu Chetty and others [A.I.R. 1955 Madras 430]** where in paragraphs 13 and 14, the High Court has enumerated the 5 principles for exercising the equity jurisdiction in appointing receivers and are as follows:

(13) The five principles which can be described as the 'panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding: - 'Mathusri v. Mathusri, 19 Mad 120 (PC) (Z5); - 'Sivagnanathammal v. Arunachallam Pillai, 21 Mad LJ 821 (Z6); - 'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (Z7); - 'Tirath Singh v. Shromani Gurudwara Prabandhak Committee', AIR 1931 Lah 688 (Z8); - 'Ghanasham v. Moraba', 18 Bom 474 (Z9); - 'Jagat Tarini Dasi v. Nabagopal Chaki', 34 Cal 305 (Z10); - 'Sivaji Raja Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); - 'Prasanno Moyi Devi v. Beni Madhab Rai', 5 All 556 (Z12); - 'Sidheswari Dabi v. Abhayeswari Dabi', 15 Cal 818 (Z13); - 'Shromani Gurudwara Prabandhak

Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); - *'Bhupendra Nath v. Manohar Mukerjee'*, AIR 1924 Cal 456 (Z15).

(2) *The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit.* - *'Dhumi v. Nawab Sajjad Ali Khan'*, AIR 1923 Lah 623 (Z16); - *'Firm of Raghubir Singh Jaswant v. Narinjan Singh'*, AIR 1923 Lah 48 (Z17); - *'Siaram Das v. Mohabir Das'*, 27 Cal 279 (Z18); - *'Muhammad Kasim v. Nagaraja Moopnar'*, AIR 1928 Mad 813 (Z19); - *'Banwarilal Chowdhury v. Motilal'*, AIR 1922 Pat 493 (Z20).

(3) *Not only must the plaintiff show a case or adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.* - *Manghanmal Tarachand v. Mikanbai'*, AIR 1933 Sind 231 (Z21); - *'Bidurramji v. Keshoramji'*, AIR 1939 Oudh 61 (Z22); - *'Sheoambar Ban v. Mohan Ban'*, AIR 1941 Oudh 328 (Z23).

(4) *An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security*

of the property. It would be different where the property is shown to be 'in medio, that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession; it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. - 'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); - 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25); - 'Mithuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); - 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disintitiled himself to the equitable relief by laches, delay, acquiescence etc.

(14) To sum up as stated in - 'Crawford v. Ross, 39 Ga 44 (Z28),

"The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending.

In -'Dozier v. Logan', 101 ga 173 (Z29) Atkinson J. said"
"The appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the creditors is exposed to manifest peril."
Therefore, this exceedingly delicate and responsible duty will be discharged with the utmost caution and only when the 'panch sadachar' or five requirements embodied in the words just and convenient (O.40, R.I) are fulfilled by the facts of the case under consideration - ('Ramachandrayya v. Nethi Iswarayya', AIR 1952 Hyd 139 (Z30))."

8. This judgment is seen followed by the Madras High Court itself in the judgment in **Mrs.S.Karpagam v. R.Shanmugam [2000 (2) MLJ 768]** where it has been held thus:

"There is no evidence on material to show that the respondent had committed waste or damage to the suit properties. Even though the court has got absolute discretion in the matter of appointment of Receiver, it is settled law that the discretion cannot be exercised in an arbitrary and unreasonable manner. It has to be exercised cautiously, judiciously and according to well established legal principles. It is settled law that the court would not as a rule appoint a Receiver at the instance of a person alleging a mere legal title against any party who is in actual possession of the real estate and disturb his possession. Even if the plaintiff had established a prima facie title to the property in question, still the plaintiff must allege and establish to the satisfaction of the court that but for the appointment of a receiver the rental accounts which is the subject matter of the dispute will be either wasted,

damaged or ruined or the amounts will be misappropriated."

9. This court also had, occasion to consider this issue in the judgment in **Parmanand Patel (Dead) by LR. and Another v. Sudha A. Chowgule and Ors. 2009 (2) KLT Suppl. 684 (SC)** where in paragraph 15, it was held thus:

"Although, the learned counsel for the parties have addressed us at great length and in fact we have been taken through the minutest details of the relevant and important documents filed and relied on by the parties, we are of the opinion that it would not be prudent on our part to discuss the same in great details.

A receiver, having regard to the provisions contained in O.40 R.1 of the Code of Civil Procedure, is appointed only when it is found to be just and convenient to do so.

Appointment of a receiver pending suit is a matter which is within the discretionary jurisdiction of the Court. Ordinarily the Court would not appoint a receiver save and except on a prima facie finding that the plaintiff has an excellent chance of success in the suit. It is also for the plaintiff not only to show a case of adverse and conflict claims of property but also emergency, danger or loss demanding immediate action. Element of danger is an important consideration. Ordinarily, a receiver would not be appointed unless a case has been made out which may deprive the defendant of a de facto possession. For the said purpose, conduct of the parties would also be relevant."

10. Our attention was also drawn to the judgment of this court in **Mary v. Biju P. Sebastian [2010 (3) KLT 174]** where it was held that a Receiver cannot be appointed merely because it will not cause any harm to anyone.

11. Having thus seen the legal principles that govern the appointment of Receiver in a suit, we will have to now advert to the facts of the case on hand. As we have already stated, the plaintiffs are claiming partition of the plaint schedule properties while the first defendant had denied the partiability of the properties, except item Nos. 8 and 9 in which, according to him, plaintiffs are entitled to 1/6th share each. He also relies on Ext.A1 partition deed of 1994. As per the recitals in Ext.A1, on which the plaintiffs admit that they have affixed the signature, the plaintiffs have relinquished their rights over the properties. It is the case of the plaintiffs that the said document is a void document in as much as they affixed their signatures acting on the representation that it is a power of attorney. Suffice it to say that the partiability of substantial items of the plaint schedule properties would depend upon the conclusions of the court on the validity of Ext.A1. Yet another aspect which has to be considered is that though a vague

averment has been made that the first defendant is trying to alienate the properties and is misappropriating the income from the properties, there is absolutely no material whatsoever to substantiate this allegation. All these, therefore, would suggest that the impact of an order of appointing a Receiver would be divesting the first defendant 's possession over the same and such an order cannot be passed.

12. Resultantly, the order passed by the trial court dismissing IA 3102/13 is unassailable and does not merit interference in this appeal.

Appeal fails and it is dismissed accordingly.

SD/-
ANTONY DOMINIC
JUDGE

SD/-
P.V.ASHA
JUDGE

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