

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

FAO (RO).No. 26 of 2015 ()

AS 69/2011 of III ADDL. DISTRICT COURT, THIRUVANANTHAPURAM
OS 420/2002 of II ADDL.SUB COURT, THIRUVANANTHAPURAM

APPELLANTS/RESPONDENTS 1 & 2 / DEFENDANTS 1 & 2:

1. UNNIKRISHNAN NAIR

UMA VIHAR, KURAKANNI DESOM, VARKALA VILLAGE
CHIRAYINKIL TALUK.

2. SUNITHA

D/O.GOVINDA KURUP, KURAKANNI DESOM, VARKALA VILLAGE
CHIRAYINKIL TALUK.

BY ADVS.SRI.L.MOHANAN

SMT.LIGEY ANTONY

RESPONDENTS/APPELLANT AND RESPONDENTS 3 TO 6 / PLAINTIFF AND
DEFENDANTS 3 TO 6:

1. BEENA BAUL

D/O.REETA PAUL, BEENA BHAVAN, T.C. 26/872 (1)
PANAVILA JUNCTION, THIRUVANANTHAPURAM -695 004.

2. VIJAYAN

S/O.GOVINDA KURUP, UMA VIHAR, KURAKANNI DESOM
VARKALA VILLAGE
VARKALA P.O. - 695 141.CHIRAYINKIL TALUK.

3. SAINUDEEN

S/O.FAKIR MOIDEEN, SABEENA MANZIL, PALLIPURAM VILLAGE
KANIYAPURAM P.O. - 695 301.

4. HARIKUMAR

TELTRON COURIER SERVICE, PANAVIDA JUNCTION
THIRUVANANTHAPURAM - 695 004.

5. SATHAGOPAN NAIR

T.C. 4/1250, KARAMANA
KARAMANA P.O. THIRUVANANTHAPURAM - 695 301.

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN FINALLY HEARD
ON 16-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.B.SURESH KUMAR, J.

F.A.O.(R.O.) No.26 OF 2015

Dated 16th July, 2015

J U D G M E N T

The decision of the District Court, Thiruvananthapuram in A.S.No.69 of 2011 by which O.S.No.420 of 2002 on the file of the Sub Court, Thiruvananthapuram was remitted for fresh disposal, is under challenge in the appeal.

2. O.S.No.420 of 2002 was a suit instituted mainly for setting aside three sale deeds in respect of the plaint schedule properties and for declaring the title of the plaintiff over the same. The case of the plaintiff is that the documents sought to be set aside are documents executed by her by way of security for the loans availed by her husband, the sixth defendant from the defendants 1 and 4. According to the plaintiff, despite the sale deeds referred to above, she is continuing in possession of the plaint schedule properties and is occupying the building therein. Defendants 1 to 3 contested the suit by filing a written statement. The essence of the contention raised by them in the written statement was that the

documents sought to be set aside are genuine and not vitiated in any manner. As regards the case of the plaintiff that she is still in possession of the properties, it was contended by the defendants that they have permitted the plaintiff to occupy the building in the plaint schedule properties to carry out orchid plantation based on an agreement executed by the plaintiff. According to defendants 1 to 3, the plaintiff is only in permissive occupation of the building in the plaint schedule properties and she is liable to vacate the building in the plaint schedule properties on demand. It was also contended by defendants 1 to 3 that though the plaintiff was required to surrender the building in the plaint schedule properties, she refused to surrender the building on untenable grounds. On the aforesaid contentions, defendants 1 to 3 raised a counter claim also in the suit seeking a decree of mandatory injunction directing the plaintiff to surrender the building in the plaint schedule properties.

3. The evidence in the case consists of the oral testimonies of PWs.1 to 5 and Exts.A1 to A18 on the side of the

plaintiff and the oral testimonies of DW1 and DW2 and Exts.B1 to B3 on the side of the defendants. Among the documents produced on the side of the plaintiff, Exts.A6, A16 and A17 are the documents sought to be set aside and among the documents produced on the side of the defendants, Ext.B1 is the document claimed to have been executed by the plaintiff to carry out orchid plantation in the building in the plaint schedule properties.

4. The trial court found that the documents sought to be set aside are not vitiated in any manner whatsoever and that the same were executed for consideration with the intention of transferring the properties. The trial court also found that the plaintiff has not established that she is in possession of the plaint schedule properties. As regards the counter claim, the trial court found that the plaintiff is occupying the building in the plaint schedule properties as permitted by the contesting defendants as per the terms of Ext.B1 agreement. In the light of the said findings, the suit was dismissed and the counter claim was decreed, granting

defendants 1 to 3 a decree of mandatory injunction directing the plaintiff to surrender vacant possession of the building in the plaint schedule properties.

5. Aggrieved by the decision of the trial court, the plaintiff filed A.S.No.69 of 2011. During the pendency of the appeal, the plaintiff filed I.A.No.2359 of 2014 seeking leave to amend the plaint. Though defendants 1 and 2 opposed the application for leave to amend the plaint, the appellate court allowed I.A.No.2359 of 2014 as per order dated 5.11.2014. In the light of the order passed on I.A.No.2359 of 2014, the appellate court on the same day set aside the decision of the trial court and remitted the suit for fresh disposal. Defendants 1 and 2 are aggrieved by the said decision of the appellate court and hence this appeal.

6. Heard the learned counsel for the appellants.

7. The learned counsel for the appellants contended that the plaint can be amended at the appellate stage only if satisfactory reason is shown as to why the amendment of the plaint was not sought when the matter was pending before the

trial court. According to the learned counsel, no explanation whatsoever was shown by the plaintiff for having not sought leave to amend the plaint when the matter was pending before the trial court and as such, leave to amend the plaint should not have been granted by the appellate court. Alternatively, the learned counsel for the appellants contended that merely for the reason that leave was granted to the plaintiff to amend the plaint, it was not obligatory for the appellate court to remit the suit for fresh disposal. According to the learned counsel, if the amendment does not introduce any new factual allegations, it is the duty of the appellate court to decide the appeal on merits. It was contended by the appellants that the amendment in the instant case does not introduce any new factual allegations in the plaint and therefore, the appellate court ought to have decided the appeal on merits.

8. A close reading of I.A.No.2359 of 2014 filed by the plaintiff seeking leave to amend the plaint indicates that the amendment was sought mainly to change prayer (A) in the plaint. The remaining amendments sought were only ancillary

to the main amendment. Originally, prayer (A) in the plaint stood as follows:

“A. a decree to set aside sale deed No.2087 dated 2.9.98, sale deed No.366 dated 5.2.2001 and sale deed No.365 dated 5.2.2001 of Chalai Sub Registry, Thiruvananthapuram as null and void and declare the title of the plaintiff over the plaint 'A' and 'B' schedule properties under sale deed No.2871 dated 12.11.1984 and Sale deed No.66 dated 7.1.1982 of Chalai Sub Registry, Thiruvananthapuram.”

The said prayer (A) was amended as follows :

“A. a declaratory decree declaring that sale deed No.2087 dated 2.9.98, sale deed No.366 dated 5.2.2001 and sale deed No.365 dated 5.2.2001 of Chalai Sub Registry, Thiruvananthapuram are not binding on the plaintiff and inoperative and declare the title of the plaintiff over the plaint 'A' and 'B' schedule properties under sale deed No.2871 dated 12.11.1984 and Sale deed No.66 dated 7.1.1982 of Chalai Sub Registry, Thiruvananthapuram and directing the second and fourth defendant to execute a re-conveyance deed to the plaintiffs in respect of Plaint A and B schedule properties.”

While granting leave to amend the plaint, the appellate court took note of the fact that the amendment was only to change

the main prayer in the suit without introducing new facts or cause of action. The appellate court also took note of the fact that the amendment sought by the plaintiff, in the circumstances, will not alter the nature of the suit. In other words, the appellate court found that the amendment would not cause any prejudice to the defendants. In the said circumstances, I do not find any illegality in the order allowing the application for amendment.

9. As indicated above, the plaintiff has not introduced any new facts or cause of action by way of amendment. As such, I do not think that the defendants are entitled to an opportunity to file additional written statement in the suit. Since new facts are not introduced by way of the amendment, there is no scope to adduce evidence as well. In the circumstances, according to me, the appellate court should have decided the appeal on merits. The decision of the appellate court in remitting the suit for fresh disposal, in the circumstances, is unsustainable.

In the result, the appeal is allowed and the matter is

remitted to the appellate court for consideration and disposal on merits.

Sd/-

P.B.SURESH KUMAR, JUDGE.

tgS

(true copy)