

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 23RD DAY OF JUNE 2015/2ND ASHADHA, 1937

FAO.No. 105 of 2014 ()

(AGAINST THE ORDR DATED 27/11/2013 IN E.P.NO.778/2012 IN
E.P.NO.129/2008 IN O.S.NO.118/96(VATAKARA SUB COURT) ON THE FILE OF SUB
COURT,KOZHIKODE)

APPELLANT(S)/1ST RESPONDENT IN EA O.778/2012:

K.P.KESAVAN, AGED 59 YEARS,
S/O. KRISHNAN, KUNIYIL PARAMBATH HOUSE,
AZHIYOOR AMSOM DESOM, VATAKARA TALUK,
PRESENTLY RESIDING AT "SNEHALAYAM", KALLUMALA,
P.O.CHOMBALA, (VIA)VATAKARA,
KOZHIKODE DISTRICT-673 308.

BY ADVS.SRI.C.VATHSALAN
SRI.K.RAKESH ROSHAN
SMT.THUSHARA.V

RESPONDENT(S)/CLAIM PETITIONER AND JUDGMENT DEBTORS :

1. SATHYA BAMA, AGED 57 YEARS,
D/O. NARAYANAN NAIR, THALAKKUNNATH HOUSE, RAROTH AMSOM
KARIGAMANNA DESOM, KOZHIKODE TALUK-673 573.

2. MYTHILI, AGED 55 YEARS
W/O. PUSHPAKARAN, NEROTH HOUSE, THAMARASERRY
KOZHIKODE TALUK-673 573.

3. KAVITHA , AGED 33 YEARS
D/O. PUSHPAKARAN, NEROTH HOUSE, THAMARASERRY
KOZHIKODE TALUK-673 573.

4. VINITHA , AGED 31 YEARS
D/O.PUSHPAKARAN, NEROTH HOUSE, THAMARASERRY
KOZHIKODE TALUK-673 573.

5. SARATHA , AGED 28 YEARS
D/O. PUSHPAKARAN, NEROTH HOUSE, THAMARASSERY,
KOZHIKODE DISTRICT-673 573.

R2-R5 BY ADV. SRI.T.B.SHAJIMON
R1 BY ADV. SRI.SRINATH GIRISH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON

23-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.**

F.A.O.No. 105 of 2014

Dated this the 23rd day of June, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

The decree holder/auction purchaser is the appellant. He had obtained an order of attachment in a suit on 15/11/1996. That attachment was obtained as if the land belonged to the second defendant Pushpakaran. He put the decree in execution and brought the property for sale. The sale was effected.

2. The first respondent herein filed an application from which this appeal arises. She called it claim petition, but had also mentioned that the petition is filed under Order 21 Rule 90 CPC. We have seen the lower court records. The relief sought for in that petition is for a declaration that the claim petitioner is the absolute owner of the petition schedule property and to declare that the sale conducted in execution proceedings is as a result of fraud and collusion committed by the judgment debtors, decree holder etc. and, therefore, it is null and void. The pleadings in that claim petition contains ingredients which could be referable to a

claim petition under Order 38 Rule 5, as also some of the ingredients of an application to set aside sale on the ground of fraud, illegality etc., also referable to Order 21 Rule 90 of CPC.

3. In the aforesaid context, we looked into the merits of the rival claims. Person against whom the suit was instituted is one Pushpakaran. He had sold the property in question to one Aburahimankutty on 1/11/1995. That person, in turn, sold the property to one Subramaniyan Nair. The claim petitioner is the wife of the said Subramaniyan Nair. She got an assignment by way of gift from her husband. Thus, it is clear that Pushpakaran does not have any subsequent title to the property under attachment.

4. The learned counsel for the appellant very persuasively attempted to show that the consideration shown in the different transactions may tend to indicate that the transfer by Pushpakaran was one by fraud or pretext. We have bestowed our anxious consideration to that aspect of that matter as well. This is a claim petition and not one where the plaintiff sued seeking relief as against the property, which could have been referred to be that of Pushpakaran and one which could have been allegedly transferred in fraud of creditors. We also do not see that any material was placed on record before the court below to substantiate any such contention. Under such circumstances, we are unable to countenance any

defence to the claim petition.

5. The learned counsel for the appellant also refers to the decisions of this Court in **Ganesh Pillai v. Sudevan** [ILR 2013(1) Kerala 206] and **Kunjukrishnan v. Sankaran** (1971 KLT 553) to say that a person, who claims antecedent title de hors the judgment debtor, cannot institute an application under Order 21 Rule 90 C.P.C. That position is well settled. In the case in hand, what was projected by the first respondent before the court below was that she had independent right; but that, the transfer from Pushpakaran was effected much before the attachment. Hence, the precedents cited by the learned counsel for the appellant do not dislodge the sustainability of the application from which this appeal arises. The court below has rightly allowed the claim raised by the first respondent Sathya Bama.

6. For the aforesaid reasons, this appeal fails.

In the result, this appeal is dismissed. No costs.

Sd/-
THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge

