

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

Mat.Appeal.No. 752 of 2013 ()

AGAINST THE JUDGMENT DATED 21.11.13 OF FAMILY COURT, ERNAKULAM IN
UNNUMBERED OP OF 2013

APPELLANT/PETITIONER:

PRIYA EAPEN, (PRIYA BIJU MENON), AGED 31 YEARS,
D/O.EAPEN NINAN, RESIDING AT 102A, SIVARAM NAGAR
SOUTH ENCLAVE, CHUNGAM, COIMBATORE-45.

BY ADV. SMT.MARY BENJEMIN

RESPONDENTS/RESPONDENTS:

1. BIJU MENON, AGED 37 YEARS,
S/O.MR.P.GOPINATH, RESIDING AT 19/70(2), HOUSE NO.44,
AYILYAM, A.K.G.NAGAR, WEST YAKKARA
MURIKKAVU, PALAKKAD, PIN-678 001.
2. M/S DESAI HOMES
OWNERS AND PROMOTERS & BUILDERS
HAVING ITS PRESENT OFFICE AT 40/7669, C40, FIRST FLOOR
D.D.VASTRA MAHAL, MARKET ROAD, COCHIN-682 011
REPRESENTED BY ITS DIRECTOR.
3. MR.V.R.DESAI, AGED 56 YEARS
S/O LATE R.M.DESAI, PARTNER, M/S DESAI HOMES
OWNERS AND PROMOTERS & BUILDERS
RESIDING NO.31/1772 Q, D.D.VILLAGE, MAY FIRST ROAD
THAMMANAM, KOCHI-682 032.
4. HOUSING DEVELOPMENT
FINANCE CORPORATION LTD., PKM COMPLEX, FIRST FLOOR
MISSION SCHOOL JUNCTION, PALAKKAD-678 014
REPRESENTED BY ITS BRANCH MANAGER.

R1 BY ADV. SRI.V.B.RAMANUNNI

R4 BY ADV. SRI.THOMAS JAMES MUNDACKAL

R4 BY ADV. SMT.S.AMBILY

R4 BY ADV. SMT.K.V.SHENU

R2 BY ADV. SMT.SREEKALA KRISHNADAS

R4 BY ADV. SRI.K.K.CHANDRAN PILLAI (SR.)

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 10-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Mat.Appeal.No. 752 of 2013 ()

ANNEXURE-I COPY OF THE ORIGINAL PETITION FILED BEFORE THE FAMILY COURT, ERNAKULAM.

ANNEXURE-II COPY OF THE INJUNCTION PETITION FILED IN THE ORIGINAL PETITION BHEFORE THE FAMILY COAURT, ERNAKULAM.

ANNEXURE-III ORDER DATED 21.11.13 OF THE FAMILY COURT, ERNAKULAM.

/TRUE COPY/

P.S TO JUDGE

cl

C.K. ABDUL REHIM & K. RAMAKRISHNAN, JJ.

.....
M.A.No.752 of 2013
.....

Dated this the 10th day of August, 2015.

“CR”

JUDGMENT

Ramakrishnan,J:

The petitioner in unnumbered original petition of 2013 on the file of the Family Court, Ernakulam is the appellant herein. The original petition was presented by the petitioner before the Family Court, Ernakulam for a declaration that the entire amount of ₹17,20,150/- from out of the total amount of ₹35,20,150/- towards the sale consideration and construction cost in respect of the petition schedule apartment has been paid by the petitioner to the second respondent company and the third respondent and for an injunction restraining the first respondent, either himself, or through his men or agents from receiving the amount from respondents 2 to 4 and also for an injunction restraining respondents 2 to 4 from disbursing the amount and by a mandatory injunction directing respondents 2 to 4 to disburse the said amount to the petitioner and also for a declaration that the first respondent has no right over the petition scheduled apartment and other

consequential reliefs.

2. The case of the petitioner in the petition was that the petitioner and the first respondent are husband and wife and at the time of marriage, the first respondent was a Hindu by religion and he embraced Christianity and thereafter the marriage was solemnized on 16.11.2005 at CSI Church, Coimbatore. After the marriage, the first respondent took the petitioner to his house at Palakkad and they started living together there. Out of the wedlock, a girl child by name Diya was born to them. At the time of marriage, the petitioner was employed in UTI Bank as officer earning a monthly income of ₹15,000/- and thereafter she was employed in Cityfinancial and at the time of filing the petition, she was the Manager of the Dhanalaxmi Bank earning ₹32,000/- per month. There was allegation in the petition that 60 sovereigns of gold ornaments were given at the time of marriage and first respondent and petitioner together purchased a Villa at Palakkad for an amount of ₹26 lakhs from a builder by name K. Rajan- Builtech. A loan of ₹.19 lakhs was taken from the HDFC bank and for the remaining ₹7 lakhs, the entire gold

ornaments of the petitioner were sold. Within a period of one year, the said Villa was sold for ₹31 lakhs and the HDFC loan was closed. The remaining amount was put in fixed deposit in the name of the first respondent's father's name (P.Gopinath) in UCO Bank as he will get 1% extra interest as he is an ex-employee of the UCO Bank. Based on this fixed deposit, father of the first respondent availed a car loan for the 1st respondent and part of the EMI was serviced from the interest of the fixed deposit and the remaining amount was paid from the salary of the petitioner. In the year 2008, an agreement was entered into with respondents 2 and 3 for purchase of a residential apartment having a super built up area of 16000 sq.ft numbered as 7-1 in the seventh floor of their multi storeyed building named 'DD Silver Stone' in Survey Nos.1077/5, 1081/1,1081/2, 1081/3, 1081/4, 1081/5, 1081/10, 1081/11, 1081/12 & 1082/1 of Cheranalloor village for an aggregate price of ₹35,20,150/-and other charges. Out of this ₹35,20,150/-, ₹18 lakhs was decided to be taken as loan from the HDFC bank. Remaining ₹17,20,150 lakhs was completely paid by the petitioner from the funds raised by

her. This amount was paid by closing the fixed deposit with the UCO Bank and also from the savings of the petitioner. Though the first respondent was employed at that time, he was utilizing his whole income to enjoy his luxury. After some time, there was default in payment of EMI and bank had closed the transaction and given the money to the second respondent builder. Since the contract could not be materialized, they are trying to pay the amount being the amount paid by them in connection with that transaction to the first respondent. In fact, the entire amount of ₹17,20,150/- is due to the petitioner and the first respondent has no right over the same. So the petitioner has filed the above petition seeking the above reliefs.

3. The Family Court by the impugned order returned the petition for presentation before the proper court stating that that court has no jurisdiction to entertain the same and only civil court can grant such reliefs and with that observation returned the petition for presentation before the proper court. Aggrieved by the impugned order, the above appeal has been preferred by the appellant.

4. Heard counsel for the appellant and the respondents.

5. Counsel for the appellant submitted that the court below was not justified in returning the petition on the ground that only civil court has jurisdiction to entertain the same. In fact it is a dispute between the appellant and the first respondent regarding entitlement of the amount advanced for purchase of the flat under the scheme floated by the second respondent and the third respondent. The property is situated within the jurisdiction of the Family Court, Ernakulam and as such that court alone has jurisdiction to entertain that petition. It will come under Section 7(1) Explanations (c) and (d) of the Family Court Act. Learned counsel for the petitioner has relied on the decision reported in ***Shihabudeen v. Seenath*** (2013(1) KLT 745) in support of her contention.

6. Respondents 2 and 3 have no interest in the dispute between the first respondent and the appellant. They are only in possession of the amount and they are prepared to pay the amount to whom the court directed to pay. Counsel for the 4th respondent submitted that, according to them, they are only formal parties to the proceedings and no relief has been claimed

against them. Respondents 2 and 3 had only a case that they will abide by the direction of the court ultimately regarding payment of the amount.

7. Counsel for the first respondent submitted that it is not really a property dispute and it cannot be said to be a dispute between the spouses and the relief sought for in the petition is injunction restraining the respondents 2 and 4 from making any payment and for mandatory injunction to pay the amount to the petitioner which is outside the purview of the Family Court and explanation to Section 7 is not attracted in such cases. He had relied on the decision reported in ***Vasumathi v. Valsan*** (2011(3) KLT 638) and ***Suprabha v. Sivaraman*** (2006 (1) KLT 712) and also ***Anitha v. Ramani Nair*** (2014 (2) KLT SN 73(C.No.93) in support of his contentions.

8. It is admitted that the appellant and the first respondent are man and wife and a child was born to them in that wedlock. It is also an admitted fact that an agreement was entered into between the first respondent and the second respondent regarding purchase of a flat, which is being built up by the second respondent of which 3rd respondent is the

partner by getting loan from the 4th respondent Bank. According to the petitioner, out of the total amount of ₹35,25,120/- being the amount payable for purchase of the flat, an amount of ₹17,20,150/- paid was the amount due to her and it is from her earnings that the amount has been paid and the first respondent has no right over that amount. Now, according to the petitioner, this amount is likely to be paid by respondents 2 and 3 to the first respondent and according to the appellant, he had no right over the same.

9. Section 7 of the Family Court Act deals with jurisdiction of the Family Court, which reads as follows:

7. Jurisdiction:- (1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the

area to which the jurisdiction of the Family Court extends.

Explanation:- The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974) ; and

(b) such other jurisdiction as may be conferred on it by any other enactment”

10. Explanation (c) of Section 7 deals with a suit or proceeding between the parties to a marriage in respect to the property of the parties or either of them; and (d) deals with a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship. Admittedly, the point to be decided in the suit is as to who is entitled for the amount advanced for purchase of the flat belonging to respondents 2 and 3, since the transaction has failed and only return of the amount has to be done by them. In fact, it is a suit arising out of a property transaction which failed and normally in such cases a suit will have to be filed within the jurisdiction where the property is situated. In the decision reported in

Shihabudeen's case, (cited supra), this Court has held that a suit for declaration of right, title or possession of immovable property can be instituted only within the local limits of the court within whose jurisdiction the property is situated and not within the jurisdiction where the marriage is solemnized or the husband and wife resided together or last resided together. The dictum laid down in the decisions reported in ***Suprabh's*** and ***Anitha's*** cases (cited supra) are not applicable to the facts of this case. That was not a case between the living spouses. Those suits were filed after the death of one of the spouses and relief was claimed on the basis of inheritance of the right in the property by the wife against other relatives of the deceased husband. It was in such circumstances, this Court has held that in such cases it will not fall under clause (c) to explanation section 7(1) of the Family Court Act, and Family Court has no jurisdiction to entertain such disputes.

11. Similarly in the decision reported in ***Anil Kumar v. Sheela*** (2011 (4) KLT 120) this Court has held that the claim for recovery of money by wife against husband's brother is a dispute coming under Explanation (d) to section 7(1) of the

Family Court Act and the family court has jurisdiction to entertain such claim. The dictum laid down in the decision reported in ***Vasumathi 's case (cited supra)*** has no application to the facts of this case. But, however, in that case also when a suit for injunction filed before the Munsiff Court by one of the spouses against strangers, thereafter proceedings were initiated before the Family Court for a declaration in respect of that property, this Court has held that in such circumstances both the cases will have to be tried by the Family Court and directed transfer of the case to Family Court for disposal of the cases jointly. So it will be clear from the above decision also when there is dispute regarding property right or right arising out of property between the spouses merely because third parties are also involved in respect of whom certain consequential reliefs were claimed, will not oust the jurisdiction of the Family Court to entertain the claim in respect of the same. So under the circumstances, the finding of the court below that that court will not have jurisdiction only civil court can entertain and directing return of the petition to be presented before proper court is unsustainable in law

and the same is liable to be set aside.

In the result, this appeal is allowed and the impugned order passed by the Family Court returning the petition for presentation before the proper court holding that the Family Court has no jurisdiction to entertain the petition is set aside and the matter is remitted to the court below with a direction to the Family Court to entertain the petition and number the original petition and dispose of the case in accordance with law. Till the Family Court numbers the petition and passing appropriate interim orders in the injunction application filed by the petitioner, the interim order granted by this Court will be in force.

Office is directed to communicate a copy of this judgment to the court below at the earliest.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

cl

