

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE B.KEMAL PASHA

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYASHTA, 1937

OP(C).No.1187 of 2015 (O)

E.P.NO.21/2010 IN OS NO.360/2002 of ADDL.SUB COURT,KOLLAM.

..

PETITIONER:

**GEETHANJALI PAI,W/O.MOHAN PAI,AGED 67 YEARS,
NOW RESIDING AT 18 FORDS ROAD,RANDOLPH,
NEW JERSY,07869,U.S.A FROM SUJIR VILLA,
MUNDAKKAL,KOLLAM-691001,
REPRESENTED BY HER POWER OF ATTORNEY
P.K.GOPALAKRISHNA PILLAI,S/O.KARUNAKARAN NAIR,
AGED 67 YEARS,RESIDING AT PULIMOOTTU PUTHENVEEDU,
KANMIMEL CHERRY,KILIKOLLUR,KOLLAM.**

**BY ADVS.SMT.K.G.BINDU
SMT.T.S.MAYA (THIYADIL)**

RESPONDENT:

**MOHANACHANDRAN NAIR,S/O.PADMANABHAN PILLAI,
PRO.PRASANTHI CASHEW COMPANY,
RESIDING AT HARI SREE,KOCHUPILAMOODU,KOLLAM.**

BY ADV.N.A.PREMACHANDRAN.

**THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON 26-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

pk

OP (C).No.1187 of 2015 (O)

APPENDIX

PETITIONER'S EXHIBITS:

**EXHIBIT P1: TRUE COPY OF THE POWER OF ATTORNEY DOCUMENT
DATED 21.3.2006.**

**EXHIBIT P2: TRUE COPY OF PLAINT IN OS NO.360 OF 2002 FILED BY THE
RESPONDENT.**

**EXHIBIT P3: TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE ORIGINAL
DEFENDANT IN OS NO.360 OF 2002.**

**EXHIBIT P4: TRUE COPIES OF THE JUDGMENT DATED 18.2.2009 IN OS NO.360 OF
2002.**

**EXHIBIT P5: TRUE COPIES OF THE DECREE DATED 18.2.2009 IN OS NO.360 OF
2002.**

EXHIBIT P6: TRUE COPY OF THE SETTLEMENT DEED DATED 20.9.2002.

**EXHIBIT P7: TRUE COPY OF EA NO.439/2011 FILED BY THE PETITIONER IN
E.P.NO.21/2010.**

**EXHIBIT P8: TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER TO
E.P.NO.21/2010.**

**EXHIBIT P9: TRUE COPY OF THE APPLICATION FILED UNDER ORDER 21 RULE 41
(2) OF THE CODE OF CIVIL PROCEDURE.**

EXHIBIT P10: TRUE COPY OF THE AFFIDAVIT FILED BY THE PETITIONER.

**EXHIBIT P11: TRUE COPY OF THE ORDER PASSED BY THE ADDITIONAL SUB
COURT, KOLLAM DATED 26.3.2015.**

RESPONDENT'S EXHIBITS:

NIL

//TRUE COPY//

P.S. TO JUDGE

pk

[CR]

B.KEMAL PASHA, J.

.....
O.P.(C) No.1187 of 2015
.....

Dated this the 26th day of May, 2015

J U D G M E N T

When a property is put to sale in execution of a money decree, is the court executing the decree empowered to decide the question as to 'whether the transfer of the said property by the original judgment debtor in favour of his daughter through a settlement deed just prior to the filing of the suit, and on getting the suit notice, is a fraudulent transfer?'

2. O.S. No.360 of 2002 of the Subordinate Judge's Court, Kollam was decreed on 18.02.2009 thereby allowing the respondent herein to realise an amount of ₹29,70,000/- from the additional 2nd defendant *“to the extent she inherited*

from the original defendant”. The said additional 2nd defendant is the petitioner herein. The original defendant is her father, who died pending the suit. The cause of action for the suit had arisen on 16.10.1997. It seems that notices were issued demanding the said amount from the original defendant on 18.01.2002 and 22.01.2002. The amounts were not paid and the demands were not met. Immediately thereafter, on 20.09.2002 a settlement deed was executed by the defendant in favour of the present petitioner in respect of the property in question.

3. In the suit, an attachment before judgment under Order XXXVIII Rule 5 of the Code of Civil Procedure, 1908 was obtained by the plaintiff, who is the respondent herein. On the death of the defendant, the petitioner was impleaded as the additional 2nd defendant. In respect of the property in question, the attachment was subsisting all along the suit and the attachment has not been lifted. The petitioner was aware of the attachment over the property which is being

claimed by her at present. There was no attempt to get the attachment lifted and the petitioner continued to suffer the attachment. After the passing of the decree, the same was put in execution through E.P.No.21/2010 before the court below. There is another decree also pending execution before the court as against the petitioner herein. The court below has ordered the sale of the property and the rateable distribution in the two EPs. The petitioner has challenged the execution of the decree as against the property in her favour.

4. Heard the learned counsel for the petitioner and the learned counsel for the respondent. According to the learned counsel for the petitioner, the property devolved on her through the settlement deed dated 20.09.2009 executed by the original defendant, cannot be sold in execution of the decree and the same is not permitted by the judgment and decree. The argument is that the respondent herein is allowed to realise the decree amount from the petitioner to

the extent she inherited from the original defendant and that the property in question being claimed by her at present is not one inherited by her, whereas it devolved on her through a document. Further, according to the learned counsel for the petitioner, 13 other items of property have been devolved on her by way of inheritance from the original defendant and therefore, the respondent decree holder ought to have proceeded against those properties inherited by her and not as against the property which she obtained through the settlement deed.

5. It is evident that the transfer of the property in question was effected by the father of the petitioner in her favour on getting the suit notice and just before the filing of the suit. The said transfer was not one for consideration. On hearing both sides, and on a perusal of the judgment and decree and Ext.P4 order, it is evident that the circumstances in which the said settlement deed dated 20.09.2002 was executed, clearly reveal that it is nothing but a fraudulent

transfer within the meaning of Section 53 of the Transfer of Property Act, deliberately made with intent to defeat the creditors and to delay the execution of the decree that may be passed against him. Therefore, the property in question can only be treated as a property inherited by the petitioner from her father.

6. The next question to be considered is whether the execution court has gone beyond the contours of the powers conferred on the execution court in deciding the question whether the document being claimed by the petitioner creates a fraudulent transfer or not.

7. It seems that the court below has relied on the decision in **Rajan v. D. Jayashree Nayar[2010 (1) KLT 142]**. It goes without saying that the claim is made on the basis of a document over the property proceeded against in the execution of the decree. When the petitioner contends that it is not a fraudulent transfer, the decree holder is also entitled to challenge the document on the ground that it is a

fraudulent transfer. It cannot be said that the execution court is powerless to go into that aspect. The execution court is fully competent under Section 47 of the Code of Civil Procedure to decide the other question when such a question arises in the execution proceedings.

8. In this case, the petitioner, who is the 2nd judgment debtor, was impleaded in the suit and she was aware of the fact that the said property covered by the settlement deed was attached in the suit. It seems that there was no attempt from the part of the petitioner to get the attachment lifted. Strangely enough, challenging both the judgment and decrees put in execution, the petitioner has preferred two RFAs, which are still pending before this Court. At the first instance, executions were stayed in both the RFAs and the petitioner was directed to furnish security for the decree debts. As the petitioner has failed to furnish security as ordered, stay has been vacated. Even though the petitioner claims that she has inherited 13 more other property from

the original defendant, the learned counsel for the respondent has pointed out that all those properties were mortgaged to various Banks and those properties were proceeded against by Banks for recovery of huge amounts due from the original defendant. According to the learned counsel for the respondents, those properties are not available for execution at present. It seems that the petitioner is still not prepared to furnish security for the decree amount and still she is not ready to discharge the decree debt. At the same time, she wants to clinch on the property attached in the suit, which is covered by settlement deed dated 29.09.2002, on the strength of that settlement deed. When there was no attempt from the part of the petitioner to get the attachment over the property lifted in the suit, and especially when the properties are still under attachment, there is no merit in the contentions resorted to by the petitioner as against Ext.P11 order.

9. On a perusal of Ext.P11 order and on considering

the aforesaid aspects, this Court is of the view that the execution court has not gone beyond the powers conferred on the execution court in passing Ext.P11 order. There is no illegality, irregularity or jurisdictional error in Ext.P11 order and the same is not liable to be interfered with. Matters being so, there is no merit in this Original Petition, and it is only to be dismissed, and I do so.

In the result, this Original Petition is dismissed.

Sd/- B.KEMAL PASHA, JUDGE

ul/-

[True copy]

P.S. to Judge