

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

OP(C).No. 210 of 2014 (O)

AGAINST THE ORDER/JUDGMENT IN OS 227/2011 OF SUB COURT,
KOTTARAKKARA

AGAINST THE ORDER/JUDGMENT IN OS 259/2011 OF SUB COURT,
KOTTARAKKARA

PETITIONER :

P.B.VENU
S/O.BHANU PANICKER, AGED 61, PUSHPAMANGALAM, BHARANICAVU,
PUNALUR VILLAGE, PATHANAPURAM TALUK, PIN 690 503.

BY ADV. SRI.P.B.KRISHNAN

RESPONDENTS :

1. P.B.PADMA, AGED 46 YEARS,
W/O.C.P.RENJITH, SREE THILAK, KESARI LANE,
POOJAPPURA, THIRUVANANTHAPURAM DISTRICT, PIN 690 012.

2. P.B.PUSHPARAJAN, AGED 64 YEARS,
S/O.BHANU PANICKER, PUSHPAMANGALAM, BHARANICAVU,
PUNALUR VILLAGE, PATHANAPURAM TALUK, PIN 690 503.

3. VINOO TITTY GEORGE, AGED 54 YEARS,
S/O.TITTY GEORGE, THE RETREAT, KOWDIAR,
THIRUVANANTHAPURAM, PIN 695 527.

R1,R3 BY ADV. SRI.P.A.AHAMED
R1,R3 BY ADV. SRI.THOUFEEK AHAMED
BY ADV. SRI.S.NITHIN (ANCHAL)

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 06-01-2015, ALONG
WITH RFA. 345/2014, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

OP(C).No. 210 of 2014 (O)

APPENDIX

PETITIONER'S EXHIBITS :-

- EXHIBIT P1 DATED 22/3/2011 COPY OF THE MINUTES OF THE FAMILY MEETING HELD AT PUSHPAMANGALAM, PUNALUR.
- EXHIBIT P2 DATED 28/9/2011, COPY OF THE PLAINT IN OS NO.227/2011, SUB COURT, KOTTARAKKARA.
- EXHIBIT P3 DATED 29/10/2011, COPY OF THE PLAINT IN OS NO. 259/2011, SUB COURT, KOTTARAKKARA.
- EXHIBIT P4 DATED 4/6/2012, COPY OF THE PLAINT IN OS NO. 175/2012, SUB COURT, KOTTARAKKARA.
- EXHIBIT P5 DATED 2/1/2012 COPY OF THE WRITTEN STATEMENT IN OS NO. 227/2011, SUB COURT, KOTTARAKKARA, FILED BY RESPONDENT NO.1 HEREIN.
- EXHIBIT P6 DATED 14/9/2012, COPY OF THE WRITTEN STATEMENT IN OS NO.175/2012 SUB COURT, KOTTARAKKARA, FILED BY THE PETITIONER HEREIN.
- EXHIBIT P7 DATED 16/6/2012, COPY OF THE APPLICATION, IA NO. 883/2012 IN OS NO.175/2012 FILED BY THE PETITIONER HEREIN.
- EXHIBIT P8 DATED 25/3/2013, COPY OF THE APPLICATION, IA NO. 668/2013 IN OS NO.227/2011 FILED BY THE PETITIONER HEREIN.
- EXHIBIT P9 DATED 7/12/2013, COPY OF THE ORDER IN IA NO.668/2013 IN OS NO.227/2011, SUB COURT, KOTTARAKKARA.
- EXHIBIT P10 DATED 7/12/2013, COPY OF THE JUDGMENT IN OS NO. 175/2012, SUB COURT, KOTTARAKKARA.

RESPONDENTS' EXHIBITS :- NIL.

True copy

P.A to Judge

P.N.RAVINDRAN & ANIL K.NARENDRA, JJ.

O.P.(Civil)No.210 of 2014 & R.F.A.No.345 of 2014

Dated this the 06th day of January, 2015

JUDGMENT

P.N.Ravindran, J.

A common issue arises for consideration in these cases. They were therefore heard together and are being disposed of by this common judgment. The brief facts of the case are as follows:

2. The appellant is the elder brother of the respondent. They are two among the children of late Bhanu Panicker, who died inestate on 19.5.1994. Late Bhanu Panicker had during his life time purchased properties in the names of his wife and children. It so happened that the children were not in possession of the respective holdings standing in their names but were in possession of holdings that stood in the names of others. The appellant is running a textile shop under the name and style 'Padmas' in the building standing in 5 cents of land situate in Sy.Nos.477/15, 16, 17 and 19 of Punalur Village, Kollam District. The said parcel of land and building were purchased in the name of the respondent by late Bhanu Panicker. The respondent in the appeal was earlier a partner of the firm 'Padmas'. After Bhanu Panicker passed away, a family settlement was entered into on 10.9.1998 whereby the parties

agreed for allotment of the properties purchased by their father to the respective owners.

3. It is the case of the appellant that under the family settlement, the respondent was obliged to transfer 5 cents of land situate in Sy.Nos.477/15, 16, 17 and 19 of Punalur Village, Kollam District together with the building therein to him and he and other siblings were bound to transfer different parcels of land to others. The appellant has also averred that the respondent had after the family settlement was entered into, filed O.S.No.221 of 2010 in the Court of the Subordinate Judge of Kottarakara joining P.B.Chandra Babu and P.B.Pushpa Rajan, two other children of late Bhanu Panicker as defendants and prayed for a decree directing the first defendant to execute an exchange deed in her favour regarding the plaint schedule property. A copy of the plaint in O.S.No.221 of 2010 was made available for perusal and therein, the plaint schedule property is described as 2.43 ares of land in old survey No.530/1/1/43 and 30 cents in 18.82 ares in old Sy.No.478/3 of Punalur Village, Pathanapuram Taluk, Kollam District. The respondent has in that plaint relied on the family settlement entered into on 10.09.1998.

4. After the respondent in the appeal instituted O.S.No.221 of 2010, a meeting was held on 22-03-2011. At that meeting, the

respondent in the appeal was represented by her husband C.P.Renjith. A copy of the minutes of the meeting is produced as Ext.P1 in O.P.(Civil) No.210 of 2014. The said document discloses that, P.B.Chandrababu and P.B.Pushparajan had failed to act as agreed to in the family settlement, that consequently the respondent in the appeal had instituted O.S.No.221 of 2010 in the Court of the Subordinate Judge of Kottarakara, that violation of the family settlement by P.B.Chandrababu has caused financial crisis for the respondent in the appeal and to tide over the said crisis, three among the family members have agreed to advance the sum of ₹75,00,000/- to the respondent before 22.09.2011. The said document also discloses that the appellant had agreed to pay the sum of ₹25,00,000/- to the respondent in the appeal and that the sum of ₹75,00,000/- to be paid by three persons will be settled from the sale proceeds of the property that was originally agreed to be transferred by P.B.Chandrababu to the respondent in the appeal at the rate of ₹5,00,000/- per cent. Ext.P1 also recites that the respondent in the appeal will transfer the property that houses the textiles shop "Padmas" in favour of the appellant, as per the family settlement.

5. The pleadings and materials disclose that though pursuant to Ext.P1 minutes the appellant had paid the sum of ₹7,00,000/- to the

respondent on 21.09.2011, the other parties had not paid any amount to her. A week thereafter, the appellant instituted O.S.No.227 of 2011 in the Court of the Subordinate Judge of Kottarakara joining the respondent in the appeal and P.B.Pushparajan as defendants and praying for a decree directing the respondent in the appeal (first defendant in suit) to execute an exchange deed, transferring the title of the plaint schedule property (business premises of "Padmas") in favour of the plaintiff and also for a permanent prohibitory injunction restraining the first defendant from alienating the plaint schedule property to strangers and from creating any document relating to plaint schedule property. Along with the plaint in O.S.No.227 of 2011 he had also filed I.A.No.1288 of 2011 for an interim order of injunction restraining the respondent from alienating the plaint schedule property pending disposal of the suit. On that application an ad interim order of injunction was passed on 29.09.2011. A week thereafter, the respondent in the appeal executed a sale deed dated 07.10.2011 transferring the plaint schedule property to Vinoo Titty George, the third respondent in the O.P.(Civil)No.210 of 2014, who is stated to be a close friend and associate of her husband. A month thereafter, the respondent in the appeal paid the sum of ₹21,20,340/- in repayment of the loan availed by the appellant from Pathanapuram Primary Co-operative

Agricultural Rural Development Bank and thereafter filed a memo in O.S.No.221 of 2010 on 11.10.2011 stating that she is not desirous of prosecuting the suit any further. Consequently, O.S.No.221 of 2010 was dismissed as not pressed on 11.10.2011. Later, to be exact on 04.06.2012, she filed O.S.No.175 of 2012 in the Court of the Subordinate Judge of Kottarakara for realisation of the sum of ₹14,20,340/- together with interest and costs from the appellant and his assets. The said suit was instituted on the averment that as the appellant was irregular in remitting the loan installments, the loan fell in arrears, that the officers of the bank threatened the respondent that if the loan is not repaid urgently they would be left with no option but to initiate action under the SARFESI Act and thereupon, she raised the money for repayment of the loan by selling the property to another and remitted the sum of ₹21,20,340/- on 07.10.2011. The plaintiff in O.S.No.175 of 2012 has also averred that though the defendant had agreed to discharge the liability as and when he sells 4 cents of land adjoining the site of the building where he is running his business and he had sold 4 cents of land adjoining Padmas Textiles, he paid only ₹7,00,000/- to the plaintiff and a balance sum of ₹14,20,340/- is due from him.

6. Upon receipt of summons in O.S.No.175 of 2012 the appellant entered appearance and filed Ext.P6 written statement resisting the suit. He contended that he had paid the sum of ₹7,00,000/- as agreed to in the meeting held on 22.3.2011, that the plaintiff in O.S.No.175 of 2012 had agreed to come and collect the balance sum of ₹18,00,000/- before 25.09.2011, but she did not turn up to collect the balance amount, that no notice under the SARFESI Act had been issued by the bank, that there was no diversion of funds, that the plaintiff abruptly closed the loan to make it appear that the property mortgaged belongs to her and to create false evidence to prove her title over the property, that the sale deed was executed after an order of injunction was passed by the Court of the Subordinate Judge of Kottarakara in O.S.No.227 of 2011 restraining her from alienating the property and therefore, the sale is liable to be set aside. He had also averred in the written statement that, eventhough the plaintiff had paid the amount without his knowledge, he is ready to repay the amount and since the loan availed by him was to be repaid in installments and the plaintiff has deprived him of the opportunity to repay the loan in installments, he is ready to repay the amount in installments. Shortly thereafter the appellant filed I.A.No.668 of 2013 in O.S.No.227 of 2011 and I.A.No.883 of 2012 in O.S.No.175 of 2012 praying that the said

two suits and yet another suit O.S.No.259 of 2011 may be jointly tried and disposed of. The court below considered the applications and partly allowed I.A.No.668 of 2013 and ordered joint trial of O.S.No.227 of 2011 with O.S.No.259 of 2011. I.A.No.883 of 2012 was dismissed, holding that, in view of the admission of the appellant that he is bound to repay the amount paid by the plaintiff to the bank, there is no need for joint trial of O.S.No.175 of 2012 with the other two cases. On the same day, for the very same reason, the court below decreed O.S.No.175 of 2012 allowing the plaintiff (Padma Renjith) to realise the sum of ₹15,87,431/- from the defendant (P.B.Venu) with interest at 12% per annum on the principal amount of ₹14,20,340/- from the date of suit till realisation. The decree and judgment in O.S.No.175 of 2012 are under challenge in R.F.A.No.345 of 2014 and the order dismissing I.A.No.883 of 2012 in O.S.No.175 of 2012 is under challenge in O.P.(Civil).No.210 of 2014.

7. We heard Sri.P.B.Krishnan, learned counsel for the appellant in R.F.A.No.345 of 2014 and the petitioner in O.P.(Civil).No.210 of 2014, Sri.P.A.Ahamed, learned counsel for the sole respondent in R.F.A.No.345 of 2014 who is also the first respondent in O.P.(Civil).No.210 of 2014, and Sri.S.Nithin, learned counsel for the third respondent in O.P.(Civil).No.210 of 2014. Sri.P.B.Krishnan, learned counsel for the appellant contended

referring to the averments in Ext.P2 plaint in O.S.No.227 of 2011 and the averments in Ext.P4 plaint in O.S.No.175 of 2012 that there is no dispute as regards the fact that a family settlement had been entered into between the parties on 10-9-1998 and later a meeting was held on 22-3-2011 with a view to ensure that the terms of settlement are carried out and implemented. The learned counsel submitted that, as per the terms of the family settlement, the plaintiff in O.S.No.175 of 2012 was bound to transfer the plaint schedule property to the defendant (plaintiff in O.S.No.227 of 2011), that when the appellant (P.B.Venu) became aware of an attempt by the respondent (Padma Renjith) to alienate the property against the terms of the family settlement in order to defeat that attempt he filed O.S.No.227 of 2011, that the averment in O.S.No.175 of 2012 that the loan had fallen in arrears is a false averment and that the trial Judge has not taken note of the facts and circumstances obtaining in the case while entering the finding that the defendant in O.S.No.175 of 2012 has admitted his liability to pay the amount claimed in the plaint. The learned counsel submitted that the court below ought to have taken note of the fact that the transfer of property by the plaintiff in O.S.No.175 of 2012 to the third respondent in O.P.(Civil).No.210 of 2014, who was later joined as the additional third defendant in O.S.No.227 of 2011, is

one intended to defeat the appellant's rights under the family settlement and that in such circumstances the court below erred in considering O.S.No.175 of 2012 in isolation. Referring to the 'B' diary, a copy of which was made available to us for perusal, the learned counsel contended that I.A.No.883 of 2012 and I.A.No.668 of 2013 were heard on 30-08-2012 and orders reserved, that on 12-09-2013 it was re-opened for hearing and after repeated postings, the suit was disposed of by the impugned judgment, that the balance court fee had not been paid till then and that the suit was disposed by the impugned judgment without hearing the counsel on both sides, as to whether there was any admission of the plaint claim as contended by the plaintiff. The learned counsel submitted that having regard to the relationship between the parties and the terms of the family settlement and the minutes of the meeting held on 22-3-2011, it is only just and proper that the 3 cases are jointly tried and disposed of as otherwise serious prejudice will be caused to the appellant.

8. Per contra, Sri.P.A.Ahamed, learned counsel for the first respondent contended that the plaintiff is not a party to the family settlement that, even in the meeting held on 22-3-2011, she was not personally present, that none of the parties except the appellant had acted in terms of the decision arrived in 22-3-2011, that the appellant had paid

only the sum of ₹7,00,000/- and the said sum was adjusted towards the money paid by the plaintiff in O.S.No.175 of 2012 for repayment of the loan availed by the appellant from Pathanapuram Primary Co-operative Agricultural Rural Development Bank on the security of the plaint schedule property. The learned counsel contended that, it was because of the threat held out by the bank that it will proceed against the property that the plaintiff was obliged to discharge the loan and sue for recovery of the amount spend for repayment of the loan, that the appellant had admitted his liability to repay the sum of ₹15,87,431/- and therefore, having regard to Order VI rule 6 of the Code of Civil Procedure, even without framing an issue, the court below was perfectly right in decreeing O.S.No.175 of 2012. The learned counsel contended that, as the plaint schedule property in O.S.No.227 of 2011 was admittedly mortgaged as security for the loan availed by the appellant, the plaintiff was well within her rights to salvage the property of which she was the owner.

9. We have considered the submissions made at the Bar by learned counsel appearing on both sides. We have also gone through the pleadings and the materials on record. It is evident from the pleadings and the materials on record that a family arrangement had been entered into between the parties on 10-9-1998. As per the said family

arrangement, transactions had to be entered into between the parties. One of the terms of the family settlement is that the plaintiff in O.S.No.175 of 2012 will convey 5 cents of land namely, the plaint schedule property in O.S.No.227 of 2011 to the appellant herein. The relief sought in O.S.No.227 of 2011 is to compel the plaintiff in O.S.No.175 of 2012 to perform her obligations arising out of the family settlement entered into on 10-09-1998 as also the decision taken in the meeting held on 22-03-2011. It is not in dispute that the plaint schedule property in O.S.No.227 of 2011, which stood in the name of the plaintiff was mortgaged as a security for the loan availed by the appellant and that the plaintiff in O.S.No.175 of 2012 was a guarantor to the loan transaction. The pleadings and materials on record disclose that, after selling the plaint schedule property to the additional third respondent on 22-3-2011, the plaintiff in O.S.No.175 of 2012 repaid the loan and thereafter instituted O.S.No.175 of 2012. The averments in the plaint in O.S.No.175 of 2012 more particularly the averments in paragraph 6 thereof are to the effect that it was pursuant to the threat held out by the officials of the bank that the loan was closed. The appellant has in paragraph 5 of Ext.P6 written statement averred that he had repaid ₹2,00,000/-towards the loan and that no notice under SARFESI Act had

been issued. The plaintiff in O.S.No.175 of 2012 had in the plaint admitted in categorical terms that the loan was availed on 25-1-2010. There was no material before the court below to show that, as on the date of institution of O.S.No.175 of 2012, on account of the default committed by the appellant in repaying the loan, proceedings had been initiated against the principal debtor/guarantor for the realisation of the amounts due to the bank. From the pleadings and materials on record that the inference is irresistible that, even without any demand being made by the bank, the plaintiff in O.S.No.175 of 2012 closed the loan and after adjusting the sum of ₹7,00,000/- paid by the appellant, pursuant to the meeting held on 22-03-2011 instituted O.S.No.175 of 2012. The source of the funds for repayment of the loan came from the third respondent, who is the additional third defendant in O.S.No.227 of 2011. The sale deed itself refers to the fact that the sale consideration is being used to close the loan. A question will naturally arise as to whether the repayment was made with a view to prevent the appellant from enforcing his rights under the family settlement and with a view to defeat his rights thereunder. The question as to whether the conveyance to the additional third respondent in O.S.No.227 of 2011 is sham and nominal and was only intended to prevent the appellant from enforcing the family arrangement

will necessarily have to be decided. Without noticing the fact that the admission made by the appellant to the effect that he had availed a loan, that the plaintiff in O.S.No.175 of 2012 was the guarantor, that she had repaid the loan and that he is willing to pay the sum of ₹15,87,431/- was only qualified and was not unconditional, the court below proceeded to hold that the appellant has admitted his liability to pay the plaint claim. The court below lost sight to the fact that O.S.No.227 of 2011 filed by the appellant to compel the plaintiff in O.S.No.175 of 2012 to perform her obligations out of the family settlement entered into on 10.9.1998 and the decision taken at the meeting held on 22.3.2011 is pending and that if O.S.No.175 of 2012 is disposed of based on the so called admission, serious prejudice will be caused to the appellant. The court below ought to have in that view of the matter, tried O.S.No.175 of 2012 along with the other two suits.

For the reasons stated above, we allow R.F.A.No.345 of 2014, set aside the decree and judgment in O.S.No.175 of 2012 on the file of the Court of the Subordinate Judge of Kottarakkara and remand the suit to the trial court for trial and disposal. For the very same reasons we allow O.P.(Civil).No.210 of 2014, set aside Ext.P9 order dated 07-12-2013 dismissing I.A.No.883 of 2012 in O.S.No.175 of 2012 and direct that

O.S.Nos.227 of 2011, 259 of 2011 and 175 of 2012 on the file of the Court of the Subordinate Judge of Kottarakara be tried and disposed of jointly. Having regard to the fact that both parties have filed their pleadings, the trial court is directed to try and dispose of the suits within six months from the date of receipt of a copy of this judgment. The court fee paid on the memorandum of appeal shall be re-funded in full to the appellant. If the court fee paid on the plaint in O.S.No.175 of 2012 has been refunded to the plaintiff, the court below shall proceed to try and dispose of the suit afresh, only after the court fee is remitted in full. The parties shall appear through counsel in the Court of the Subordinate Judge of Kottarakara on 2-2-2015. No costs.

P.N.RAVINDRAN, JUDGE

ANIL K.NARENDRA, JUDGE

vps/skj