

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

FRIDAY, THE 19TH DAY OF JUNE 2015/29TH JYASHTA, 1937

RSA.No.97 of 2009

**AGAINST THE JUDGMENT DATED 20.12.2008 IN AS 10/2001 of ADDITIONAL
DISTRICT COURT-II,MAVELIKKARA.**

**AGAINST THE JUDGMENT DATED 23.11.2000 IN OS O.326/1995 of MUNSIF
COURT,KAYAMKULAM.**

APPELLANT/RESPONDENT/PLAINTIFF: "

**REMA,D/O.SARASAMMA,JAYA BHARATHA BHAVANAM,
PUTHUPPALLYVILLAGE.**

**BY ADVS.SRI.R.GOPAN
SRI.M.N.SANDEEP
SRI.BASANT BALAJI**

RESPONDENT'S/APPELLANTS/DEFENDANTS:

- 1. INDRAVALLY,D/O.BHARGAVI,
PANICKAMEKKETHARAYIL,PRAYAR SOUTH MURI,
PERINADU VILLAGE.**
- 2. ANU DEEPA MURALI,D/O.INDRAVALLY, DO. DO.**
- 3. *BHAVANI,JAYABHARATH BHAVANIL,
PUTHUPPALLYNORTH MURI,PUTHUPPALLYVILLAGE.(DELETED).**

***3RD RESPONDENT DELETED FROM THE PARTY ARRAY AT THE RISK OF
APPELLANT, AS PER THE ORDER DATED 22.1.2014 IN IA 171/2014.**

BY ADV.SRI.K.SUBASH CHANDRA BOSE (CAVEATOR)

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 19-06-2015, ALONG WITH CO.78/2015, THE COURT ON THE SAME
DAY DELIVERED THE FOLLOWING:**

pk

P.BHAVADASAN, J.

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Cross Objection No. 78 of 2015

Dated this the 19th day of June, 2015

J U D G M E N T

The plaintiff, who was successful before the trial court but was non suited by the lower appellate court, is the appellant.

2. Raghavan Vaidyan was married to Rajamma. Their relationship fell apart and the status which Rajamma enjoyed was taken by Bhavani.

3. The property involved in these proceedings admittedly belonged to Raghavan Vaidyan and his wife Rajamma. When the relationship fell apart, Rajamma instituted O.S.No.324/1976 for partition. She claimed 1128 shares out of 1260 shares. It is alleged in the plaint that with the intention to defeat the rights of Rajamma and with the active collusion of Raghavan Vaidyan, Bhavani managed to obtain the purchase certificate in respect of the suit

property claiming tenancy. Since it was during the pendency of the partition suit, it was alleged that it is hit by lis-pendens. Later on, the suit property was assigned in favour of the plaintiff by Rajamma, Raghava Vaidyan and Bhavani, wherein Rajamma was represented by her power of attorney holder. Based on that document, which is Ext.A6, the suit was laid for declaration of title, recovery of possession etc.

4. The defendants resisted the suit. They pointed out that even prior to Ext.A6, Bhavani had executed Ext.B6 dated 17.04.1991 in favour of Muraleedharan and others whereby, right which Bhavani acquired over the property Bhavani had already been assigned. They contended that since Bhavani had lease hold right which she purchased in suo motu proceedings, no more rights remained to be assigned as per Ext.A6 document. Ext.B6 is with respect to ten cents.

5. It was therefore contended that the ten cents, which is assigned as per Ext.B6, is not available for the plaintiff and that is the absolute property which belonged to Muraleedharan, who now is no more and the defendants in the suit are his legal heirs. They thus resisted the suit.

6. On the basis of the above pleadings, issues were raised. The evidence consists of the testimony of PWs 1 and 2 and document marked as Exts. A1 to A12 from the side of the plaintiff. The defendants examined DWs 1 to 8 and had Exts. B1 to B26 marked. Ext.C1 is the Commissioners report and Ext.C2 is the Mahazar prepared by the Commissioner.

7. The trial court, on an appreciation of the materials before it, found that the assignment by the Land Tribunal in favour of Bhavani was during the pendency of the partition suit and therefore, it is hit by the doctrine of *lis pendens*. So, that deed can confer no right on Bhavani. The lower court then went on to hold that if that be the position, the

assignment under Ext.B6 cannot survive. Thereafter, the trial court accepted the version given by the plaintiff that partition suit namely O.S.No.324/1976, which later on, change of court, was converted into O.S.No. 117/1986 was compromised and therefore the document in favour of plaintiff is good and therefore decreed the suit.

8. The aggrieved defendants went up in appeal. The lower appellate court referred to the recitals in various documents and came to the conclusion that even assuming that the tenancy right of Bhavani is pending consideration, the said lease is admitted by the other two executants of the document and if that be so, there is no reason as to why the benefits under Ext.B6 should be denied to the defendants. Holding that Ext.B6 is good enough, the lower appellate court allowed the appeal and dismissed the suit.

9. At the time of admission of this appeal, the following substantial questions of law were formulated:

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“1. Was the lower appellate court right in holding that Ext.A6 sale deed dated 29.01.1994 on the strength of which O.S.No. 117 of 1986 on the file of the Munsiff's Court, Harippad (initially filed as O.S.No. 324 of 1976 on the file of the Munsiff's Court, Kayamkulam) was disposed of recording the compromise evidenced by Ext.A7 joint petition and Ext.A8 judgment, was hit by the doctrine of lis pendens?

2. Even assuming that Ext.A6 sale deed dated 29.01.1994 was executed during the pendency of O.S.No. 117 of 1986, would it attract the doctrine of lis pendens when as per Ext.A6 sale deed, there was no transfer by one of the parties to the suit affecting the rights of the other parties to the suit within the meaning of Section 52 of the Transfer of Property Act, 1882?

3. When the purchase certificate dated 13.08.1984 bearing certificate No. 96/1984 marked as Ext.B6 in O.S.No. 117 of 1986 in favour of the 1st defendant was held to be invalid for the same reason that the same was hit by the doctrine of lis pendens and the said finding was confirmed by the District Court, Mavelikkara in Ext.A4 judgment dated

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24.09.1988 in A.S.No. 83 of 1986 and was further confirmed by this Court in C.M.A.No. 184 of 1986 and the special leave petition against the said judgment preferred as S.L.P. No. 1427 of 1990 filed before the Supreme Court by the present first defendant was dismissed, was the lower appellate court justified in holding that the 1st defendant Bhavani had the authority to transfer the plaint schedule property on the strength of the said purchase certificate?

4. Will not the finding regarding the certificate of purchase marked as Ext.B6 in the previous suit filed by Rajamma against Ragavan Vaidyar and the present first defendant as O.S.No. 324 of 1976 before the Munsiff's Court, Kayamkulam and renumbered as O.S.No. 117 of 1986 before the Munsiff's Court, Harippad operate as res judicata in the present suit?

5. After confirming the decree passed by the trial court dismissing the counter claim filed by defendants 2 and 3 seeking recovery of possession, was the lower appellate court justified in relying on the recitals in Ext.B6 sale deed dated 17.04.1994 to dislodge the finding by the trial court that the plaintiff is in

possession of the plaint schedule property?”

10. The learned counsel appearing for the appellant contended that finding of the lower appellate court that the document in favour of the plaintiff is hit by *lis pendens* cannot have the support of law. The learned counsel, relying on Ext.A3 and A4, pointed out that in the earlier round of litigation, it was categorically found that the tenancy set up by Bhavani, on the basis of the purchase certificate obtained by her, cannot be taken note of since it was during the pendency of the suit and it is hit by doctrine of *lis pendens*. The learned counsel drew attention of this Court to the fact that the only contention which Bhavani had was that she had lease hold right over the property. Finding that the lease set up by Bhavani in the partition suit was not acceptable, the appellate court in the partition suit, on an earlier occasion, raised an issue and directed that the matter to be referred to the Land Tribunal for fresh consideration. It

was during the pendency of the suit and those proceedings that a compromise evidenced by Ext.A7 was entered into between the parties and the suit happened to be dismissed on the basis of acceptance of the compromise. Therefore, the tenancy right of Bhavani was not recognized in law and if that be so, Ext.B6 on the basis that she had absolute right over 10 cents of property which was assigned by that document, cannot have the support of law. The learned counsel went on to point out that the lower court, by a misinterpretation of various facts, came to the conclusion that the assignment in favour of the plaintiff is hit by *lis pendens*, a proposition which can have no support in law on the facts of this case. The learned counsel went on to point out that there has been a clear misdirection in appreciation of facts and law in the case and this is a fit case where interference is called for under Section 100 of C.P.C.

11. Sri. Subash Chandra Bose, the learned counsel appearing for the respondents and for the cross objectors very vehemently tried to support the finding of the lower appellate court. He, relying on the recitals in Exts. B2, B3, A1 and A6 contended for the position, in all these documents, the tenancy right of Bhavani is well recognized and accepted and if that be so, it comes with little grace now for the plaintiff to say that Bhavani had no tenancy right. Bhavani did have right over the property and that is the right which is assigned under Ext.B6. It is also pointed out that Ext.A6 is executed long prior to the compromise entered into between the parties and the suit on that basis. It is also pointed out that this is a case of clear collusion between the parties to defeat the rights of the defendant, who innocently obtained the property under Ext.B6. If as a matter of fact, Bhavani had no manner of right in the property, it was unnecessary for her to join in the execution of Ext.A6 and

also it was unnecessary for the parties to make a recital of her rights in the property. These aspects weighted with the the lower appellate court and the court was inclined to hold that Ext.B6 is good and valid and that Ext.A6 is hit by doctrine of .

12. One aspect may be mentioned at this point of time. The defendants, apart from filing the statement of defence, had also filed a counter claim for recovery of possession of the property on the strength of their title. That was dismissed. An appeal preferred from that was also dismissed. No separate appeal is seen filed before this Court except a cross objection to the appeal filed by the plaintiff.

13. After having heard the learned counsel for the appellant and the respondents, it is extremely difficult to concur with the submissions made by the learned counsel for the respondents. It is an admitted fact that the original

acquisition of the property was by Raghava Vaidyan and Rajamma and the claim put forward by Bhavani was a lease under them. When the relationship between Raghavan Vaidyan and Rajamma fell apart, Rajamma left Raghavan Vaidyan and took up residence elsewhere. Bhavani then came in and began to reside with Raghavan Vaidyan.

14. Rajamma laid O.S.No.324/1976 which later came to be renumbered as 117/1986. In the said suit for partition, the suit was decreed as against the second defendant as follows:

“In view of my findings under the aforesaid issues, there will be a preliminary decree for partition on the following terms:- Item I of the plaint schedule except the building thereon, but including its site will be divided into 1260 equal shares and the plaintiff will be allotted 1128 shares. While effecting actual division demarcation will be done in such a way as to include the Jayabharatham building in the share of the first defendant. A reservation is allowed in favour of the first defendant in

respect of the structure Jayabharatham building and its value will not be taken into account for division as aforementioned. The plaintiff will be entitled to get share of profits at a rate to be ascertained in the final decree stage for plaint item 1 excluding the building from the first defendant for the period from the date of suit until surrender of possession. The prayers in the plaint relating to item 2 of the plaint schedule are disallowed, but the plaintiff is allowed to work out her remedy of getting partition of $\frac{1}{2}$ right over item 2 in a separate suit. In the nature of this case the first defendant will pay the costs of the plaintiff. The defendant will suffer their respective costs."

15. What is significant is that the trial court found that Ext.B6 Patta in that suit, on the basis of which right was claimed by Bhavani, was hit by *lis pendens* and cannot have any legal effect. The matter was carried in appeal by Bhavani as A.S.No. 83/1986. The lower appellate court concurred with the finding of the trial court as regards the invalidity of Ext.B6. But to the right approach would be that

if it was found that Ext.B6 was not valid and could not confer right on Bhavani, it would have been only proper for the court below to have raised an issue regarding the tenancy claim put forward by Bhavani and referred it to the Land Tribunal for fresh decision. Accordingly, the appeal was allowed and an issue regarding tenancy was raised and the matter was remanded to the trial court.

16. In compliance with the direction of the lower appellate court, the trial court referred the matter to the Land Tribunal. While the matter was thus pending, Ext.B6 seems to have been executed by Bhavani in favour of the her son Muraleedharan and her grand daughter, an assignment in respect of 10 cents of property claiming that she had absolute right over the property by virtue of the Patta obtained by her.

17. Ultimately, from Ext.A7, it could be seen that the partition suit was compromised and there was no decision

either by the Land Tribunal or by the trial court regarding the tenancy claim set up by Bhavani. Ext.A7 evidences the compromise entered into between the parties and accepting the compromise, the suit was dismissed.

18. The terms of the compromise are not very clear from the records. For some reason or the other, the plaintiffs felt shy to produce the same. This has been taken note of by the lower appellate court. The lower appellate court was considerably influenced by the recital in Ext.A6 which was extracted in its judgment and so also the fact that it was behind the back of Muraleedharan that the subsequent document was executed. The lower appellate court was of the view that Ext.A6 is hit by the doctrine of *lis pendens* since it was executed during the pendency of the partition suit and it is invalid in law.

19. The lower appellate court was also of the view that the recitals contained in Ext.A6 whereby, the tenancy right

of Bhavani stands acknowledged, clothes Bhavani with sufficient right in respect of the property and the assignment by virtue of Ext.B6 is proper.

20. The learned counsel appearing for the respondent pointed out that exercising the very same powers, Bhavani had executed Ext.B1 also. No challenge is made to that document also. That recognizes the right of Bhavani.

21. The mere fact that Bhavani asserts right in herself, may not be a ground to hold that she has rights over the property. It is true in Ext.A6 that there is considerable reference to the tenancy right claimed by Bhavani and consideration of the same before the Land Tribunal. However, one cannot omit to note that on the earlier occasion, when suit was decreed by the trial court, the trial court had categorically found that assignment in favour of Bhavani by the Land Tribunal was during the pendency of the suit and that is hit by the doctrine of *lis pendens*.

22. There can be no manner of doubt that the finding so entered into by the trial court on an earlier occasion is justified in law. Even this Court had occasion to consider such an issue and has categorically held that while a suit is pending before the Civil Court, any assignment by the Land Tribunal is hit by doctrine of *lis pendens*. Bhavani, aggrieved by the said finding of the trial court, went up in appeal and the appellate court confirmed the finding regarding the invalidity of the purchase certificate obtained by Bhavani, but however was gracious enough to raise an issue regarding tenancy and directed that the matter to be referred to the Land Tribunal for fresh consideration.

23. Obviously, Ext.B6 is executed at the time when there was categoric finding that purchase certificate in favour of Bhavani was not valid in law and she derived no rights under the same. The claim therefore on the basis of Ext.B6 will be difficult to accept. For Bhavani well knew that

her claim of tenancy stood negatived and that she had no tenancy right adjudicating in her favour at that point of time.

24. It is true that the claim of tenancy right raised by Bhavani was pending consideration at the relevant time before the Land Tribunal when the compromise was entered into. One must remember here that dehors the lease hold right claimed by Bhavani, she had no manner of right over the property, as it exclusively belonged to Raghavan Vaidyan and Rajamma. So Bhavani, in order to acquire or assert any right, had to necessarily establish that she had lease hold right over the property and that she was entitled to fixity of tenure. That has not been adjudicated and finalized so far. While that was pending, the compromise was entered into. As rightly noticed by the lower appellate court, there are recitals in Ext.A6 which would refer to the tenancy claims of Bhavani and also go to the extent of conferring that in a portion of the property. But how far that

can help Bhavani to establish her right, is the different question. Especially when her right on the basis of purchase certificate earlier obtained by her had been negatived by the trial court and approved by the lower appellate court. Further, it is trite that a mere admission cannot confer title. Wisely or unwisely, Bhavani entered into a compromise of the partition suit in which she had set up a tenancy right and let the suit be dismissed. Therefore, the facts as it now stands, she and her claim of tenancy remain in suspension without being adjudicated and to crown, this is the fact that she filed a counter claim seeking recovery of possession thereby indicating that she has been thrown out of possession also.

25. The finding of the court below that because Ext.A6 is executed during the pendency of the partition suit, it is hit by *lis pendens*, may not be justified. The doctrine of *lis pendens* is invoked in case when the third parties rights are

involved and not with respect to the parties to the document. A party to the document having executed a document and having lost his suit cannot be heard to contend that the document executed by him is hit by *lis pendens*. The doctrine was evolved as principle of equity on the basis that third parties rights shall not be affected due to intervening assignments by the parties to the suit. That has no application to the facts of the case. If that be so, the finding of the court below that execution of Ext.A6 is hit by *lis pendens* cannot be supported in law and it is difficult to accept the claim put forward by contesting respondents that by virtue Ext.B6 they have acquired rights over the property. The trial court was correct in its approach that Ext.B6 cannot be given effect to and the plaintiff is entitled to succeed.

For the above reasons, this appeal is allowed and the judgment and decree of the lower appellate court are set

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aside and that of the trial court stands restored and the cross objection stands dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge