

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 22ND DAY OF SEPTEMBER 2015/31ST BHADRA, 1937

RFA (Indigent)No. 717 of 2013 (B)

AGAINST THE DECREE AND JUDGMENT IN OS 413/2011 of II ADDL.SUB
COURT,ERNAKULAM DATED 30-06-2012

APPELLANT:PLAINTIFF

T.S. JACOB,
AGED 69 YEARS,
S/O.SEEMAN,
THOZHUPPADAN HOUSE,
KANDANADU DESOM,
MANAKUNNAM VILLAGE,
ERNAKULAM DISTRICT.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENT(S):DEFENDANTS

1. T.S. YOHANNAN,
AGED 58 YEARS,
S/O.SEEMAN,
THOZHUPPADAN HOUSE,
KANDANADU DESOM,
MANAKUNNAM VILLAGE,
KANAYANNUR TALUK,
ERNAKULAM DISTRICT - 682 305.
2. JOSHY,
AGED 39 YEARS,
S/O.T.S.JACOB,
THOZHUPPADAN HOUSE,
KANDANADU DESOM,
MANAKUNNAM VILLAGE,
ERNAKULAM DISTRICT - 682 305.
3. MARY,
W/O.T.S.JACOB,
AGED 59 YEARS,
THOZHUPPADAN HOUSE,
KANDANADU DESOM,
MANAKUNNAM VILLAGE,
ERNAKULAM DISTRICT - 682 305.

R2 & R3 BY ADV. SRI BIBIN KUMAR

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
22-09-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

A P P E N D I X

APPELLANT'S EXHIBITS

NIL.

2ND AND 3RD RESPONDENT'S EXHIBITS

ANNEXURE-1: CERTIFIED COPY OF SALE DEED NO.1750/2013 DATED 30.05.2013 OF SUB REGISTRAR OFFICE, TRIPUNITHURA.

ANNEXURE-R2(b): TRUE COPY OF SETTLEMENT REPORT DATED 8.3.2014 ENTERED BETWEEN APPELLANT AND RESPONDENT NOS.2 AND 3 IN E.P.NO.418 BEFORE 2ND ADDL.SUB COURT, ERNAKULAM.

ANNEXURE-R2(c): TRUE COPY OF SALE DEED NO.1750/2013 DATED 30.05.2013 OF SUB REGISTRAR OFFICE, TRIPUNITHURA.

ANNEXURE-R2(d): TRUE COPY OF SKETCH PREPARED BY RESPONDENT NO.3 OF DECREE `B' SCHEDULE PROPERTY AND OF PROPERTY INCLUDED IN SALE DEED NO.1750/2013 DATED 30.05.2013 OF SUB REGISTRAR OFFICE, TRIPUNITHURA.

/TRUE COPY/

P.S TO JUDGE

ANTONY DOMINIC & P.V ASHA, JJ.

R.F.A (Indigent) No.717 of 2013-B

Dated this the 22nd day of September, 2015

JUDGMENT

Antony Dominic, J.

The plaintiff in O.S.No.413 of 2011 on the file of the 2nd Additional Sub Court, Ernakulam, is the appellant. The suit was filed for declaring that Ext.A6, sale deed No.1277 of 2009 executed by the 1st defendant in favour of defendants 2 and 3, is null and void. He also sought a permanent prohibitory injunction restraining the defendants from trespassing into Plaint A Schedule property and from committing waste therein. Defendants 2 and 3 contested the suit and in the written statement, they also raised counter claim, to set aside the judgment and decree of the Munsiff Court, Ernakulam in O.S.No.517 of 2007 on the ground that it is vitiated by fraud and collusion. They also sought a permanent prohibitory injunction restraining the plaintiff from interfering with their ownership, possession and enjoyment of plaint B schedule property. By the

impugned judgment and decree, the suit was dismissed and the counter claim was decreed setting aside the judgment and decree in O.S.No.517 of 2007 and granting injunction as prayed for. It is aggrieved by this judgment, the appeal is filed.

2. We heard the learned counsel for the appellant and the learned counsel appearing for respondents 2 and 3. There was no appearance or representation on behalf of the 1st respondent.

3. The case of the appellant/plaintiff was that the 1st respondent is his brother and that the second and third respondents are his son and divorced wife respectively. According to him, he had purchased 48 cents of property and a building therein, comprised in R.S.No.102/6 of Manakunnam Village in the name of the 1st respondent, out of which 15 cents was assigned in favour of his daughter and son in law. In respect of the balance 33 cents, which is Plaintiff A schedule property, it was averred that as per the judgment and decree dated 27.11.2007 in O.S.No.517 of 2007 of the Munsiff Court, Ernakulam, he had perfected title over the Plaintiff A schedule property by adverse possession and limitation. According to him,

in spite of it, on 17.07.2009, the 1st respondent executed Ext.A6 title deed in respect of 18.903 cents of land from the plaint A schedule property, which is plaint B schedule, in favour of respondents 2 and 3. According to him, the 1st respondent did not have any right to execute such a document and that the said document was executed by playing fraud, misrepresentation and collusion and therefore was void. It was, in these circumstances, he filed the suit for a declaration that Ext.A6 document is null and void and for a permanent prohibitory injunction restraining the respondents from trespassing into Plaint A schedule property.

4. Before the trial court, the 1st respondent did not contest the case. As far as respondents 2 and 3 are concerned, they filed written statement, contending that the plaintiff was never in ownership or enjoyment of plaint A or B schedule properties. It was their case that the property belonged to the 1st respondent absolutely and that the plaintiff obtained decree in O.S.No.517 of 2007 by playing fraud on the court and in collusion with the 1st respondent. They also contended that they came to know of the judgment and decree only on receipt of a

copy of the indigent application filed by the appellant in this suit. It was their case that the 1st respondent, who acquired title over the property as per Exts.B1 and B2, was entitled to convey valid title in their favour against the consideration. Respondents 2 and 3 also disputed the averments in the plaint that the marital relationship between the appellant and the 3rd respondent was dissolved by an order of court. According to him, they had no notice in any such proceedings and if at all any such order has been obtained, that also is fraudulent.

5. According to them, in addition to the property included in plaint A schedule, the 1st respondent had purchased another 3 cents for using it as pathway to plaint A schedule property. There was an oral agreement between the 1st respondent and respondents 2 and 3 and one Jolly, another daughter of the 3rd respondent, on 12.11.1997. It is stated that pursuant to that oral agreement, 15 cents out of the property purchased by the 1st respondent by Exts.B1 and B2 from one Ammini was sold to Jolly and her husband Johny, and that out of the 15 cents thus sold, the purchasers had alienated 5 cents in favour of one Shaji, who had constructed a house and is residing

therein. The respondents contended that it was thereafter that, on 17.07.2009, the 1st respondent executed Ext.A6 sale deed, by which plaint B schedule was conveyed in favour of respondents 2 and 3. They also contended that the case of the plaintiff that he acquired the property in the name of the 1st respondent is hit by the provisions of the Benami Prohibition Act. They contended that, being bonafide purchasers, their rights over the property were unaffected and that they were entitled to enjoy the same without any interference from the appellant.

6. On the aforesaid averments, they raised a counter claim praying to set aside the decree in O.S.No.517 of 2007 and they also sought an injunction restraining the plaintiffs from disturbing their ownership, possession and enjoyment of plaint B schedule property.

7. Before the trial court, the plaintiff was examined as PW1. Respondent No.2 and two brothers of the 3rd respondent were examined as DWs 1 to 3. Exts.A1 to A6 and B1 to B12 were also marked. On conclusion of the trial, by the impugned judgment and decree, the suit was dismissed and a decree in terms of the counter claim was passed.

8. Among the various issues raised, the two main issues that were framed are whether the decree in O.S.No.517 of 2007 obtained by the appellant was by fraud and collusion with the 1st defendant and whether the decree is liable to be set aside. These issues were found in favour of respondents 2 and 3. It was primarily on that basis, the suit was dismissed and the counter claim was decreed. Since the outcome of this appeal would also depend on our finding on these two issues, we shall first consider the correctness of the findings of the trial court on these two issues.

9. As we have already stated, 48 cents of landed property comprised in R.S.No.102/6 of Manakkunnam village, was acquired by the 1st respondent by Exts.B1 and B2 title deeds executed in his favour by Ammini. Nobody has a case that going by the recitals in these documents the sale consideration was paid, either partly or fully, by anybody other than the 1st respondent himself. Out of this 48 cents, 15 cents of land was conveyed by the 1st respondent to the appellant's daughter and her husband against consideration. Plaint A schedule property is the balance 33 cents of land. In this appeal, the respondents

have produced as Annexure-1, along with I.A No.1953 of 2014, certified copy of sale deed No.1750/2013 of Tripunithura Sub Registry. Annexure-1 is a sale deed executed by the 1st respondent on 30.05.2013 conveying another portion of plaint A schedule property to a stranger.

10. In O.S.No.517 of 2007, the case of the plaintiff was that he had perfected title in respect of Plaint A Schedule property against the 1st respondent by adverse possession and limitation. Though by his own pleadings, the appellant had conceded title of the property in favour of the 1st respondent, strangely and for no valid reason, the 1st respondent had chosen to remain exparte in that suit. It is still more curious to notice that, during the pendency of this suit before the trial court, the 1st respondent had filed Exts.A2 and A4 applications praying to set aside the exparte decree and to condone the delay in applying for the same. However those I.As were allowed to be dismissed as per Exts.A3 and A5 orders, as not pressed. When a person is admittedly having title over a property, normal human behaviour does not justify his deliberate failure to contest a suit in which his title is likely to lost. In so far as O.S.No.517 of 2007

is concerned, what had happened is that, not only the suit was allowed to be decreed exparte but also the I.A filed in the suit for setting aside the exparte decree was also dismissed as not pressed. Such a conduct on the part of the 1st respondent necessarily leads to the inference that it was only as a result of his collusion with the appellant, who is none other than his own brother.

11. While in O.S.No.517 of 2007 the appellant contended that he had perfected title over plaint A schedule property by adverse possession and limitation; in O.S.No.413 of 2011, from the judgment and decree of which this appeal arises, his case is that, he had acquired the property in the name of the 1st respondent. However, when he was examined as PW1, his evidence is to the effect that he has also contributed for acquiring the property. In other words, he did not have a case that he had expended the sale consideration in its entirety from his own resources. Therefore not only that the decree and judgment in O.S.No.517 of 2007 was obtained in the aforesaid circumstances, his case in O.S.No.413 of 2011 was contradictory to his own case in O.S.No.517 of 2007.

12. The appellant had claim over the 48 cents of land including the plaint A schedule property. If there was any truth in that claim, one is at a loss to understand why the appellant did not challenge the sale deed executed by the 1st respondent in favour of his daughter and her husband, who have also alienated a portion thereof in favour of one Saji. Although it is true that the appellant attempted to explain this by contending that with his consent and knowledge, the property was given on the occasion of the marriage of his daughter and that it was therefore that he did not have any complaints about this sale. Even that story canvassed by the appellant is unbelievable because if as a matter of fact the property was given to his daughter out of love and affection and on the eve of her marriage, such a transaction would not have been a sale against valid consideration. This also, therefore, indicates that the appellant himself had accepted the fact that the 1st respondent had valid title over the property at the time when he had executed the sale deed in favour of the appellant's daughter in 2007. Similarly, there is also no valid explanation from the appellant for not challenging Annexure-1 sale deed produced in

this appeal. All these facts also reinforce the possibility that the decree could not have been obtained in O.S.No.517 of 2007 otherwise than by fraud or collusion between the appellant and the 1st respondent.

13. In this context yet another factual aspect that also is required to be noticed. After acquiring plaint A schedule property, the 1st respondent himself had acquired 3 cents of property for using as a pathway to plaint A schedule property. The appellant does not dispute the title of the 1st respondent in respect of the 3 cents. If as a matter of fact 48 cents including plaint A schedule property was in fact acquired by the appellant, the 1st respondent would not have purchased these 3 cents alone. Similarly, if the appellant had perfected title over plaint A schedule property in any other manner, there is no reason why he should not have raised a similar claim against this 3 cents also.

14. All these factual aspects, which are sufficiently pleaded in the written statement and also spoken to by the witnesses, clearly establish that the trial court was justified in its conclusion that the exparte decree in O.S.No.517 of 2007 of the

Munsiff's Court, Ernakulam is vitiated by fraud and collusion between the appellant and the 1st respondent.

15. Consequently the trial court was fully justified in dismissing the plaint and granting decree in terms of the counter claim.

We do not find any merit in this appeal for interference.

The appeal is therefore dismissed.

Sd/-
ANTONY DOMINIC
Judge

Sd/-
P.VASHA
Judge

rtr/

/true copy/

P.S to Judge