

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 23RD DAY OF JUNE 2015/2ND ASHADHA, 1937

RSA.No. 92 of 2011 ()

AGAINST THE COMMON JUDGMENT AND DECREE IN AS 36/2010 of ADDITIONAL DISTRICT COURT, PALA DATED 03-08-2010.

AGAINST THE JUDGMENT AND DECREE IN OS 86/2007 of MUNSIFF COURT, PALA DATED 17-01-2008.

APPELLANTS/APPELLANTS/DEFENDANTS::

- 1. K.C.PRATAP, S/O.CHANDRASEKHARAN NAIR,
UNIVERSITY EMPLOYEE, RESIDING AT VETTATHU HOUSE,
VAIKOM ROAD, PALA FROM MADAVANA HOUSE,
VELLILAPPALLY VILLAGE, EDAKKOLY KARA.**
- 2. MINI PANICKER, W/O.K.C.PRATAP,
RESIDING AT VETTATHU HOUSE, VAIKOM ROAD,
PALA FROM MADAVANA HOUSE, VELLILAPPALLY VILLAGE,
EDAKKOLY KAR.**

BY ADV. SRI.A.K.HARIDAS.

RESPONDENT/RESPONDENT /PLAINTIFF::

**RAMACHANDRAN NAIR, NEPHEW OF SIVARAMAN NAIR,
MADAVANA HOUSE, EDAKKOLY KARA,
VELLILAPPALLY VILLAGE - 686 574.**

**BY ADVS. SRI.DEVAN RAMACHANDRAN.
SRI.V.K.PEERMOHAMED KHAN**

**THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
23-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

amk

A.HARIPRASAD, J.

R.S.A No.92 of 2011

Dated this the 23rd day of June, 2015.

J U D G M E N T

Appellants are the defendants in O.S No.86/2007, a suit for specific performance of Exts.A4 and A5 agreements and also for prohibitory injunction. The trial court decreed the suit. The defendants unsuccessfully challenged the decree and judgment before the lower appellate court. Parties are referred to as the plaintiff and defendants for the sake of convenience.

2. Heard the learned counsel for the appellants/defendants.

3. Facts in brief are as follows :

First defendant is the nephew of the plaintiff. Second defendant is the wife of the first defendant. Plaint schedule property originally belonged to mother of the plaintiff and grandmother of the first defendant. She executed a settlement deed (Ext.A1) settling the property in the names of the plaintiff and first defendant. As per the recitals in Ext.A1, the property

became jointly owned by the plaintiff and the first defendant. While so, a portion of the property was assigned by the plaintiff and the first defendant in the name of the second defendant as per Ext.A2. The first defendant contended that the plaintiff as per Ext.A3 release deed in the year 2003 released his rights over the property, which was remaining after Ext.A2 assignment, in favour of the first defendant. It is the case of the first defendant (appellant) that thereafter he became the absolute owner of the property. Per contra, the plaintiff contended that Exts.A2 and A3 documents were happened to be executed without any consideration and they were executed only for the purpose of enabling the first defendant to secure a loan from a bank. It is also the contention of the plaintiff that subsequently Ext.A4 agreement was executed between the plaintiff and the first defendant on 13-03-2005, whereby the first defendant agreed to re-convey the property either to the plaintiff or to his daughter.

Thereafter on 30-05-2005, another agreement was executed between the plaintiff and both the defendants purportedly agreeing to re-convey the properties involved in Exts.A2 and A3. According to the contentions raised by the defendants in the written statement, from the month of June, 2004 onwards the first defendant experienced some psychological problems. Thereafter, he became an addict to alcoholic drinks. Both the plaintiff and the first defendant used to meet everyday and they used to take liquor together. The plaintiff exploiting the weak mental state of the first defendant caused him to execute Exts.A4 and A5 agreements. The second defendant denied her signature on Ext.A5. The courts below after considering the evidence decreed the suit and the defendants were directed to execute the document in tune with Exts.A4 and A5.

4. Learned counsel for the appellants contended that the decisions made by the courts below are legally unsustainable.

According to him, the finding of the courts below that there was no consideration for Exts.A2 and A3 is incorrect. Along with the appeal, I.A No.1632/2011 is filed under Order 41 Rule 27 C.P.C. First defendant in his written statement has contended that Ext.A3 release deed is supported by consideration and he has paid Rs.3.5 lakhs to the plaintiff as per a cheque drawn in the name of the plaintiff. It is also contended by the learned counsel that the amount was directly paid by the bank to the plaintiff as the loan availed by the first defendant was a loan to purchase the share interest of the plaintiff over the property. So, in such circumstances, the bank will not make any payment to the buyer, but only to the vendor. It is also contended at the time of evidence that the plaintiff had received money from the bank as consideration for Ext.A3 release deed. In the affidavit, it is mentioned that the receipt obtained from the concerned branch of State Bank of India was given to the counsel who conducted

the case. But due to his omission, the document could not be produced at the time of trial or even in the first appeal. I have perused the receipt issued by the Branch Manager, State Bank of India, Kaipuzha Branch wherein, it is mentioned that a sum of Rs.3.5 lakhs was received by the plaintiff from the said bank towards the sale price of his 50% share in the property in dispute. However, the document needs proper proof. In other words, this document cannot be relied on without properly proving the same after giving an opportunity to the plaintiff to challenge its veracity. But the fact remains that the document if proved would cut at the root of the plaintiff's case.

5. Another argument advanced by the learned counsel for the appellants is that a mere reading of Exts.A4 and A5 agreements would show that it is not supported by any consideration. If the contention that Exts.A2 and A3 happened to be executed without any consideration falls to ground, then

Exts.A4 and A5 would become unenforceable for the reason that no consideration is stipulated in both these agreements. However, this question is dependent upon the acceptability of evidence relating to the validity of Exts.A2 and A3 documents. The courts below committed a grave error in finding that Exts.A4 and A5 are enforceable without considering the above said aspects. It is true that additional evidence is only produced at the second appeal stage. Order 41 Rule 27 C.P.C enlists certain situations in which production of additional evidence in appellate court can be permitted. Order 41 Rule 27(1)(b) C.P.C says that the appellate court may require any document to be produced or any witness to be examined to enable the court to pronounce judgment or for any other substantial cause. In my view, the document now produced along with the application is relevant to find out whether Ext.A3 document is supported by consideration. If that is decided, the enforceability of Exts.A4

and A5 also can also be properly decided.

6. The reasons stated for submitting additional evidence at this stage is proper. Therefore, I am of the view that additional evidence produced in this case will have to be taken into consideration for deciding the case. Having found that the additional evidence should be allowed for an effective adjudication of the case, the only course open to this court is to remand the matter either to the trial court or to the lower appellate court. Considering the nature of evidence to be received, I am of the view that the matter need not be remitted to the trial court, but it can be remitted to the lower appellate court for fresh consideration as this Court can direct the lower appellate court by invoking powers under Order 41 Rule 28 C.P.C to take additional evidence. Hence the following directions :

In the result, the regular second appeal is allowed.

The impugned judgment and decree of the lower appellate court is set aside. The matter is remitted back to the lower appellate court for fresh disposal after allowing the appellants to produce additional evidence before the court below. It is made clear that the respondent/plaintiff can also adduce evidence to support his contentions. The appellants shall take back the document produced before this court and produce it before the court below and prove the same in accordance with law. In that event, the lower appellate court shall dispose of the matter on merits after considering the entire evidence.

The parties are directed to appear before the court below on 27th July, 2015.

All pending interlocutory applications will stand dismissed.

Sd/-
A.HARIPRASAD,
JUDGE.
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