

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

FRIDAY, THE 5TH DAY OF JUNE 2015/15TH JYAISHTA, 1937

RFA.No. 192 of 2014 (J)

AGAINST THE JUDGMENT IN OS 210/2010 of SUB COURT, PAYYANNUR DATED 30-09-2013

APPELLANT(S)/DEFENDANTS:

1. KOVVAPRATH PURAYIL RAHMATHUNISSA, AGED 37 YEARS
D/O.SUHARABI, MATHIL, ALAPPADAMBA AMSOM
VADAVANTHOOR, TALIPARAMBA TALUK, KANNUR DISTRICT.
2. KOVVOPRATH PURAYIL MUMTHAZ, AGED 30 YEARS
D/O.SUHARABI, SHAHUL QUARTERS, NEAR ISD SCHOOL
KELOTH, PAYYANNUR, KANNUR DISTRICT.

BY ADVS.SRI.K.V.MANOJ KUMAR
SRI.P.R.SREEJITH
SRI.M.PROMODH KUMAR

RESPONDENT/PLAINTIFF:

ASNAPATH SHAHUL HAMEED, AGED 62 YEARS
S/O.MOOPPANTAKATH MAMMU, PAPPINISSERI, KANNUR TALUK
REPRESENTED BY P.A.HOLDER KOOVAPRATH PURAYIL KAIRUNNISSA
D/O.LATE HASSAN, EDAT, EDANADU PO
KUNHIMANGALAM ASMOM
KANNUR TALUK AND DISTRICT-670327.

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON
05-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

R.F.A.No.192 of 2014

Dated this the 5th day of June, 2015

JUDGMENT

The appellants are the defendants in O.S.No.210 of 2010 on the file of the Court of the Subordinate Judge of Payyannur. The said suit was filed by the respondent herein seeking a declaration that he has title over the plaint schedule building and that he be allowed to recover possession of the said building from the first appellant, who is the first defendant in the suit, through the process of court. The court below by judgment delivered on 30.9.2013 decreed the suit declaring that the respondent/plaintiff has title over the plaint schedule building and allowed him to recover possession of the same from the first appellant/first defendant through the process of court. Aggrieved by the judgment and decree passed by the court below, the defendants are before us in this appeal.

2. We heard the arguments of the learned counsel for the appellants.

3. The plaint averments in brief are as follows:

4. The plaint schedule building originally belonged to the second defendant who is none other than the sister of the first

defendant. The second defendant obtained the plaint schedule building with a larger extent of property from her mother by virtue of a gift deed bearing No.2506 of 2005 of S.R.O., Payyannur. The plaintiff obtained the plaint schedule building and property from the second defendant by virtue of Ext.A1 sale deed dated 3.11.2010 registered as document No.4822 of 2010 of S.R.O., Payyannur. He was put in possession of the property on the very same day. The plaintiff and his family members are residing in the middle east for employment purposes. On 10.11.2010, the plaintiff came to know that the first defendant trespassed into the plaint schedule building and occupied it in an unlawful manner. The plaintiff through his power of attorney holder questioned the act of the first defendant and demanded her to vacate the plaint schedule building. At that time, the first defendant informed him that she had some dispute with the second defendant who is the assignor of the plaintiff and unless and until that dispute is settled, she will not vacate the plaint schedule building. The plaintiff's power of attorney was also informed that the plaintiff has no title over the plaint schedule building. When the plaintiff enquired about the matter with the second defendant, she informed that there is no such dispute with the first defendant and that she has nothing to do with the

trespass made by the first defendant. On 30.11.2010, the plaintiff demanded the first defendant to vacate the plaint schedule building, but the first defendant was not ready to vacate the building. Hence the suit was filed for declaring the plaintiff's title and ownership over the plaint schedule building and also for recovery of possession of the same from the first defendant on the strength of title.

5. Defendants 1 and 2 filed a written statement contending that the second defendant is the owner of the plaint schedule building. According to the defendants, it is incorrect to say that the second defendant sold the property to the plaintiff by virtue of Ext.A1 sale deed dated 03.11.2010 and the plaintiff was never put in possession and ownership of the said property. It was contended that the allegation in the plaint that on 10.11.2010, the first defendant trespassed into the plaint schedule building is absolutely false. In the written statement, it was contended that the plaintiff and defendants 1 and 2 are close relatives, that the plaint schedule building and property belonged to the second defendant, that one Abdul Basheer and two others filed O.S.No.78 of 2010 in the Court of the Subordinate Judge of Payyannur with respect to the property of the second defendant and when there was an attempt to attach the plaint schedule

property and the building therein, the plaintiff approached the second defendant and caused her to believe that if a document is registered in favour of others, the second defendant can escape from such attachment and believing the words of the plaintiff, the second defendant executed Ext.A1 sale deed in the name of the plaintiff. According to the defendants, though the document was registered in the name of the plaintiff under the aforesaid circumstances, possession of the plaint schedule building or property was not handed over to the plaintiff. It was also contended that no consideration was received by the second defendant from the plaintiff and that even after execution of Ext.A1 sale deed, the defendants are residing in the plaint schedule building. It is also alleged that the plaintiff filed the suit in collusion with one Abdul Basheer, the plaintiff in O.S.No.78 of 2010 and that the second defendant is intending to take steps to get Ext.A1 sale deed declared as null and void. In the said circumstances, the defendants contended that the plaintiff is not entitled to get any of the reliefs sought for and that the suit is only to be dismissed with costs.

6. On the side of the plaintiff, he was examined as PW1 and Exts.A1, A2, X1 and X2 were marked. On the side of the defendants, the second defendant was examined as DW1 and two other witnesses

were examined as DW2 and DW3. Exts.B1 to B3 were produced and marked on the side of the defendants.

7. On an appreciation of the pleadings and the evidence on record, the court below came to the conclusion that the plaintiff has satisfactorily established his title over the plaint schedule building and therefore he is entitled to get a declaration as sought for. The court below further held that since the plaintiff has got valid title over the plaint schedule building, he is entitled to get a decree for recovery of possession of the plaint schedule building from the first defendant on the strength of his title. In the result, the suit was decreed as prayed for with costs.

8. The learned counsel for the appellants/defendants would contend that the court below ought to have found that Ext.A1 sale deed is a sham document, which was not acted upon. The finding of the court below that DW1 had voluntarily executed Ext.A1 sale deed in favour of PW1 is against facts and the evidence on record, it was contended. The learned counsel further contended that the previous attachment over the property in question before execution of Ext.A1 sale deed is an indication that the registration of the aforesaid document was in the circumstances narrated by the defendants.

Further, it was submitted that the intention of the parties can be gathered from the pleadings and the evidence on record, based on which the court below ought to have concluded that Ext.A1 is a sham document which was not intended to be acted upon.

9. We have considered the contentions raised on behalf of the appellants/defendants.

10. In the plaint, the specific case of the respondent/plaintiff is that he is having absolute ownership and title over the plaint schedule building on the strength of Ext.A1 sale deed dated 3.11.2010 executed by the second defendant in his favour. In the written statement filed by the appellants/defendants, it is admitted that the second appellant/second defendant has executed Ext.A1 sale deed in favour of the respondent/plaintiff. But the defendants would contend that Ext.A1 sale deed is a sham document and is not supported by consideration. The specific case put forward by the defendants was that, when there was an attempt in O.S.No.78 of 2010 filed in the Court of the Subordinate Judge of Payyannur, by one Abdul Basheer to attach the property of the second appellant/second defendant, the respondent/plaintiff, who is a close relative of the second appellant/second defendant approached her and caused her to believe that if a document

is registered in favour of others, she can escape from such attachment and on believing the words of the respondent/plaintiff, the second appellant/second defendant executed Ext.A1 sale deed in the name of the respondent/plaintiff in order to save her property from attachment. The appellants/defendants would further contend that though Ext.A1 document was registered in the name of the respondent/plaintiff, possession of the property was never handed over to him and they are still residing in the plaint schedule building.

11. Since execution of Ext.A1 sale deed is admitted by the second appellant/second defendant, who was examined as DW1, the burden lies on her to prove that it is a sham document not supported by any consideration. But, as noticed by the court below, the evidence of DW1 would make it clear that she had executed Ext.A1 sale deed in the name of respondent/plaintiff, who was examined as PW1 with free consent and that she had put her signature in the said document before the Sub Registrar, after understanding the contents of the sale deed.

12. The specific case of DW1 is that when there was an attempt to attach her property in O.S.No.78 of 2010 filed by one Abdul Basheer and two others, PW1 approached her and made her believe that, if a

document is registered in favour of others, she can escape from an order of attachment over the property and it was accordingly, on believing the words of PW1, she had executed Ext.A1 sale deed in the name of PW1. During cross examination, DW1 has stated that it was on 3.11.2010 that PW1 approached her for the first time and demanded execution of a registered document in order to save her property from attachment. Ext.A1 sale deed is admittedly executed on 3.11.2010 itself. Ext.B1 encumbrance certificate discloses that the property of DW1 was attached in O.S.No.78 of 2010 as early as on 18.5.2010, i.e., much prior to the execution of Ext.A1 sale deed on 3.11.2010. Therefore, the document produced on the side of the appellants/defendants itself would show that the property of DW1 was under attachment much prior to the execution of Ext.A1 sale deed. If that be so, the contention of DW1 that when there was an attempt to attach her property she executed Ext.A1 sale deed in the name of PW1 in order to escape from an order of attachment cannot be believed at all.

13. The evidence of DW1 would show that the total extent of property owned by her is 31½ cents. Ext.A1 sale deed is only in respect of 12 cents out of the said 31½ cents. If the intention of DW1

in executing Ext.A1 sale deed was to save her property from attachment as contended by her, Ext.A1 sale deed should be with respect to the entire extent of 31½ cents of property owned by her. As rightly noticed by the court below, DW1 failed to offer any explanation for not including the entire extent of her property in Ext.A1 sale deed. Further, the evidence of DW1 is to the effect that out of 31½ cents of property owned by her, she sold 12 cents of property to PW1 by virtue of Ext.A1 sale deed and that she is in possession of the remaining extent.

14. Ext.A1 sale deed executed by DW1 in the name of PW1 recites that, after receiving the sale consideration shown in the document, she has executed the sale deed and that possession of the property and building described therein is delivered over to PW1 with effect from the date of execution of the document. In Ext.A1 sale deed, DW1 declares that she has no right over the property described therein with effect from the date of execution of the document. It has come out in evidence that DW1 had voluntarily executed Ext.A1 sale deed before the Sub Registrar after understanding its contents. There is absolutely no indication in Ext.A1 sale deed to show that possession of the property was retained by DW1. Further, DW1 has also no case

that after execution of Ext.A1 sale deed, she retained the original thereof in her custody without handing it over to PW1. As noted by the court below, the intention of the parties can be gathered from the recitals in Ext.A1 sale deed itself, which did not indicate that the transaction was not a genuine one.

15. In **Kaliaperumal v. Rajagopal and another (2009 (4) SCC 193)** the Apex Court held as follows:

"Sale is defined as being a transfer of ownership for a price. In a sale there is an absolute transfer of all rights in the properties sold. No rights are left in the transferor. The price is fixed by the contract antecedent to the conveyance. Price is the essence of a contract of sale. There is only one mode of transfer by sale in regard to immovable property of the value of ₹100/- or more and that is by a registered instrument. It is now well settled that payment of entire price is not a condition precedent for completion of the sale by passing of title, as Section 54 of Transfer of Property Act, 1882 ('Act' for short) defines 'sale' as a transfer of ownership in exchange for a price paid or promised or part paid and part promised. If the intention of parties was that title should pass on execution and registration, title would pass to the purchaser even if the sale price or part thereof is not paid. In the event of non-payment of price (or balance price as the case may be) thereafter, the remedy of the vendor is only to sue for the balance price. He cannot avoid the sale. He is, however, entitled to a charge upon the property for the unpaid part of the sale price where the ownership of the property has passed to the buyer before payment

of the entire price, under Section 55(4)(b) of the Act. Normally, ownership and title to the property will pass to the purchaser on registration of the sale deed with effect from the date of execution of the sale deed. But this is not an invariable rule, as the true test of passing of property is the intention of parties. Though registration is prima facie proof of an intention to transfer the property, it is not proof of operative transfer if payment of consideration (price) is a condition precedent for passing of the property. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act."

16. The appellants/defendants would contend that Ext.A1 sale deed is not supported by any consideration at all. Ext.A1 sale deed recites that a sale consideration of ₹2,50,000/- is paid to DW1 and that after receiving the said sale consideration, DW1 has executed the sale deed. According to PW1, Ext.A1 sale deed was executed by DW1 after receiving an amount of ₹13,00,000/- as sale consideration, but only an amount of ₹2,50,000/- was shown as sale consideration in Ext.A1, since it was agreed that the fair value of the property alone be shown

as the sale consideration in the document. In order to substantiate the said contention, PW1 would rely on Ext.A2 sale agreement dated 22.10.2010 by which DW1 had earlier agreed to sell the property covered by Ext.A1 sale deed to the wife of PW1 for a total consideration of ₹13,00,000/- after receiving the sum of ₹4,00,000/- as advance. During cross examination, DW1 admitted execution of Ext.A2 agreement for sale with the wife of PW1. DW1 has further admitted that she had received an amount of ₹4,00,000/- from the wife of PW1 in terms of Ext.A2 sale agreement and that the said amount was received by encashing Ext.X1 cheque. Ext.X2 bank statement would prove payment of the aforesaid sum of ₹4,00,000/- to DW1. Therefore, the oral evidence of DW1 supported by Ext.A2 sale agreement, Ext.X1 cheque and Ext.X2 bank statement prove that DW1 received a sum of ₹4,00,000/- as advance sale consideration in terms of Ext.A2 agreement for sale in respect of the very same property covered by Ext.A1 sale deed. Though DW1 had during cross examination stated that after obtaining ₹4,00,000/- from the wife of PW1, she paid back the said amount to the power of attorney holder of PW1, the said version of DW1 was rightly discarded by the court below as not reliable.

17. We notice that, the appellants/defendants have no case in their written statement that DW1 had received only a part of the sale consideration mentioned in Ext.A1 sale deed and that she has not received the balance sale consideration. On the other hand, their definite case in the written statement is that DW1 has not received any amount as sale consideration for executing Ext.A1 sale deed. But the recitals in Ext.A1 sale deed read in the light of the oral evidence of DW1 would make it abundantly clear that DW1 had received consideration for executing Ext.A1 sale deed. As admitted by DW1 she had received ₹4,00,000/- from the wife of PW1, which is more than the sale consideration mentioned in Ext.A1 sale deed. Payment of the aforesaid sum of ₹4,00,000/- is proved by Ext.X1 cheque and Ext.X2 bank statement for the period from 1.9.2010 to 31.12.2010. In such circumstances, the court below was right in repelling the contention raised by the appellants/defendants that Ext.A1 sale deed is not supported by any consideration.

18. In the written statement, the appellants/defendants had no case that PW1 was abroad at the time of execution of Ext.A1 sale deed. But in the affidavit filed in lieu of chief examination DW1 has stated that PW1 was abroad at the time of execution of Ext.A1 sale deed.

Admittedly, Ext.A1 sale deed was executed on 3.11.2010. During cross examination DW1 has stated that on 3.11.2010, PW1 approached her and asked her to execute a registered document to save her property from the attempt to attach the property in O.S.No.78 of 2010 filed by one Abdul Basheer and two others. During cross examination, DW1 has no case that such a request was made by PW1 while he was abroad. In such circumstances, the evidence of DW2, the scribe of Ext.A1 sale deed and that of DW3, a staff working under DW2, that PW1 was not present in the office of DW2 at the time of preparation of Ext.A1 sale deed has no relevance at all.

19. In **Bishundeo Narain Rai (dead) by L.Rs. and others v. Anmol Devi and Others 1998 (7) SCC 498** the Apex Court held as follows:

“Section 8 of the Transfer of Property Act, 1882 declares that on a transfer of property all the interests which the transferor has or is having at that time, capable of passing in the property and in the legal incidents thereof, pass on such a transfer unless a different intention is expressed or necessarily implied. A combined reading of S.8 and S.54 of the Transfer of Property Act suggests that though on execution and registration of a sale deed, the ownership and all interests in the property pass to the transferee, yet that would be on terms and conditions embodied in the deed indicating the intention of the parties. It follows that on execution and registration of a sale deed, the ownership title

and all interests in the property pass to the purchaser unless a different intention is either expressed or necessarily implied which has to be proved by the party asserting that title has not passed on registration of the sale deed. Such intention can be gathered by intrinsic evidence, namely, from the averments in the sale deed itself or by other attending circumstances subject, of course, to the provisions of Section 92 of the Evidence Act.”

20. In the case on hand, as we have already noticed, the appellant/defendants have admitted execution of Ext.A1 sale deed by DW1 in favour of PW1. The evidence of DW1 would show that she had voluntarily executed Ext.A1 sale deed after understanding its contents. Going by the recitals in Ext.A1 sale deed, it was executed after DW1 received the sale consideration shown therein. The recitals in Ext.A1 sale deed would further show that possession of the property and building described therein was handed over to PW1 with effect from the date of execution of Ext.A1. Further, DW1 has no case that she had retained the original of Ext.A1 sale deed in her custody, without handing over it to PW1, even after execution of Ext.A1. During cross examination, DW1 has admitted that out of 31½ cents of property owned by her, she sold 12 cents to PW1 as per Ext.A1 sale deed and that she is in possession of the remaining property. When no contra intention can be gathered from the recitals in Ext.A1 sale deed, it can

only be concluded that on the strength of Ext.A1 sale deed, possession of the property and the building described therein was handed over to PW1 with effect from the date of execution of Ext.A1. Further, the mere fact that the entire sale consideration paid to DW1 was not shown in Ext.A1 sale deed is not at all sufficient to hold that the said document is a sham one. If the said document is insufficiently stamped, it would be open to the authorities concerned to take action against the purchaser for non-payment of proper stamp duty and it is not a valid ground either to declare the said document as sham document or to non-suit the purchaser.

21. Though the appellants/defendants would contend that Ext.A1 sale deed was executed when there was an attempt to attach the property owned by DW1 in connection with O.S.No.78 of 2010 filed by one Abdul Basheer and two others, the order of attachment in that suit was made on 18.5.2010 much prior to the execution of Ext.A1 sale deed on 3.11.2010. In **A.G.M.Constructions Pvt.Ltd. v. Shibu Kumar ad others (2010 (4) KLT 189)**, this Court held as follows:

“Section 64 of the Code of Civil Procedure, 1908, does not make the transfer after attachment invalid or ineffective between the defendant and his transferee. The transaction continues to be valid between the transferor and the transferee, but the only limitation is that the transaction cannot prevail over claims

arising under attachment.”

22. It has come out in evidence that the PW1 could not remit property tax in respect of the property covered by Ext.A1 sale deed, since the same was not accepted by the Village Officer, due to the attachment over the said property. When there is no indication in Ext.A1 sale deed to show that the possession of the property was retained by DW1, merely on the strength of Ext.B3 tax receipt, DW1 cannot contend that possession of the property was not handed over to PW1 on the date of execution of Ext.A1 sale deed. It is pertinent to note that though in the written statement the appellants/defendants would contend that DW1 is intending to take steps to get Ext.A1 sale deed declared as null and void, she had not taken any such steps during the pendency of the suit. It was after analysing the entire evidence on record, the court below came to the conclusion that PW1 has established his title over the plaint schedule building on the strength of Ext.A1 sale deed and that DW1 failed to prove that Ext.A1 is a sham document not supported by any consideration.

23. The specific case of PW1 is that after execution of Ext.A1 sale deed, the first appellant/first defendant, who is the sister of DW1 trespassed into the plaint schedule building and occupied it in an

unlawful manner. Admittedly, the first appellant/first defendant has absolutely no title over the plaint schedule building. She has also not chosen to enter the box and adduce evidence to show that she is in occupation of the plaint schedule building on the strength of any valid title. When PW1 has established his title over the plaint schedule building, he is entitled for recovery of possession of the same from the first defendant as prayed for in the suit. The finding of the court below that the respondent/plaintiff has got valid title over plaint schedule building and that he is entitled to get a decree for recovery of possession of the same from the first appellant/first defendant on the strength of his title cannot be termed either perverse or legally unsustainable.

We accordingly hold that there is no merit in the appeal. The appeal fails and the same is dismissed. No order as to costs.

Sd/-

P.N.RAVINDRAN, JUDGE

Sd/-

ANIL K.NARENDRAN, JUDGE