

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

THURSDAY, THE 16TH DAY OF JULY 2015/25TH ASHADHA, 1937

RSA.No. 482 of 2015 ()

AGAINST THE DECREE AND JUDGMENT IN AS NO.426/2014 of III ADDITIONAL DISTRICT
COURT, THIRUVANANTHAPURAM DATED 31-01-2015

AGAINST THE DECREE AND JUDGMENT IN OS NO. 283/1997 of MUNSIF
COURT,VARKALA DATED 15-02-2001

APPELLANT(S)/RESPONDENT IN AS/DEFENDANT IN OS:

THAJUDDIN, S/O.SHAHUL HAMEED, AGED 49
RISWANA MANZIL, COLONEY JUNCTION
NAVAIKULAM DESAM, KADAVOOR VILLAGE
FROM VADAKKUMKARAMOOLA VEEDU, NAVAIKULAM DESAM
KADAVOOR VILLAGE.

BY ADV. SRI.M.RAJENDRAN NAIR
SMT.SANTHY M.

RESPONDENT(S)/APPELLANT IN AS/PLAINTIFF OS:

ALIYARUKUNJU, AGED 58
S/O MUHAMMED KUNJU
RESIDING AT KUNNUVILA PUTHEN VEEDU
VADAKKUMKARA MOOLA, AYIRAMONNILA, NAVAIKULAM DESAM
KUDAVOOR VILLAGE, PIN-695013.

BY ADV. SRI.G.S..REGHUNATH (CAVEATOR)

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON
16-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A.HARIPRASAD, J.

R.S.A. No.482 of 2015

Dated this the 16th day of July, 2015

JUDGMENT

Challenge in this appeal is against the judgment and decree of the learned Additional District Judge, Thiruvananthapuram in A.S.No.426 of 2014. The suit was one for declaration of title and possession and also for a prohibitory injunction. Defendant in the suit is the appellant herein. Plaintiff is the contesting respondent.

2. Basic facts relevant for disposal of the case are as follows: The plaintiff and defendant are half brothers. Plaintiff A schedule property belonged to Shahul Hameed. He is the step-father of the plaintiff. He gifted the property to plaintiff as per a document of the year 1970. There is no dispute in respect of plaintiff A schedule property. Subject matter of the dispute is plaintiff B schedule property. It is the case of the plaintiff that for having a motorable access to plaintiff A schedule property, the plaintiff, while working abroad, entrusted money to his step father, deceased Shahul Hameed and requested him to purchase plaintiff B schedule property for facilitating access to plaintiff A schedule property. Plaintiff B schedule is a strip

of land having a length of 634 links and width of 24 links. From the date of purchase of the plaint B schedule, it was used as a private road leading to plaint A schedule property. Even though the plaintiff requested his step father to purchase plaint B schedule property in his name, for some reasons it was purchased in the name of deceased Shahul Hameed. Later Shahul Hameed died and disputes arose between the defendant and the plaintiff in respect of plaint B schedule property. Hence, a suit for the above reliefs was filed.

3. The defendant filed a written statement contending that the plaint B schedule property was purchased by deceased Shahul Hameed with his own funds. He was in exclusive possession and enjoyment of the property. After the death of Shahul Hameed, the property devolved on his legal heirs. Plaintiff has no right or possession over the property. The suit is legally not maintainable. The contentions of the plaintiff are hit by the provisions in the Benami Transactions (Prohibition) Act, 1988.

4. The trial court after considering the evidence, dismissed the suit finding that the plaintiff is not entitled to get any of the reliefs claimed. Plaintiff took up the matter before the learned Additional District Judge in appeal. Learned Additional District Judge allowed the appeal in part. The finding of the trial court in respect of the declaratory relief was confirmed by

the lower appellate court. Now it has become final. The lower appellate court allowed a prohibitory injunction decree against the defendant (appellant) from causing obstructions to the plaintiff's user of plaint B schedule property as a road including vehicular traffic. Aggrieved by this finding, the defendant has come up in appeal.

5. Heard the learned counsel for the appellant and the respondent.

6. The lower appellate court considered implication of Ext.A4 release deed executed by wife and daughter of deceased Shahul Hameed in favour of the plaintiff. Even though it has a caption, 'release deed', the recitals in the document would go to show that rights of the executants over plaint B schedule property have been conveyed to the plaintiff for consideration. It is well settled that a nomenclature of the document is not the sole factor to be considered for interpreting the deed. The trial court is right in holding that there cannot be a release of property by a person in favour of a third party, who does not have any pre-existing right over the property. But, that by itself cannot be taken as a reason to discard Ext.A4, as the recitals therein are clearly indicative of an assignment of co-ownership right of two legal heirs of deceased Shahul Hameed in favour of the plaintiff. Now the emerging position is that the plaintiff has become a

co-owner with the defendant in respect of plaint B schedule property.

7. In the light of these facts, learned counsel for the appellant contended that the court below fell in error in granting a prohibitory injunction decree against the defendant preventing him from using the property in the way in which it could be used by a co-owner. Per contra, learned counsel for the respondent contended that plaint B schedule property, from its nature, description and identity, can only be used as a pathway. That aspect has been factually found by the trial court and it was confirmed by the lower appellate court. Therefore, fact that plaint B schedule property is being used as a road to have access to plaint A schedule property is a concluded fact. Grievance of the appellant/defendant is that by passing such a decree, he is prevented from enjoying the property in any manner a co-owner wishes. I am afraid, a co-owner, although may have right over every inch of the property and entitled to enjoy it, shall not use a co-ownership property in derogation of the rights of other co-owners who also have equal rights. The apprehension of the appellant that this judgment will stand in the way of filing a suit for partition is without any legal basis. I make it clear that the injunction decree, in its present form, will not affect the right of the defendant to enjoy the property without causing any disturbance or interference with the rights of the other

co-owner over the property, as it is established that the plaintiff is using it as an access to plaint A schedule property. I do not find any substantial question of law arising in this matter.

The appeal is dismissed.

A. HARIPRASAD, JUDGE.

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