

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

WEDNESDAY, THE 28TH DAY OF OCTOBER 2015/6TH KARTHIKA, 1937

RSA.No. 1106 of 2015 ()

**AGAINST THE JUDGMENT & DECREE IN AS.NO. 200/2011
OF ADDL. DISTRICT COURT – IV, KOLLAM DATED 05-06-2015**

**AGAINST THE JUDGMENT & DECREE IN OS.NO. 948/2008 OF PRINCIPAL SUB COURT,
KOLLAM DATED 29-07-2011**

APPELLANT/APPELLANT/PLAINTIFF :

**SUKESINI,
AGED 63 YEARS, D/O.LATE DEVAKI,
THEKKEVILA VEEDU, MURUNTHAL CHERI
THRIKKADAVOOR VILLAGE, KOLLAM-691601.**

**BY ADVS.SRI.P.B.SAHASRANAMAN
SRI.T.S.HARIKUMAR**

RESPONDENT/RESPONDENT/DEFENDANT :

**SAJEEV CHANDRAN,
AGED 59 YEARS, S/O.ACHUTHAKURUP,
NELLIKOTTU PUTHEN VEEDU, CHIRATTAKONAM WARD,
CHAKKUVARAKKAL VILLAGE, KOTTARAKKARA,
KOLLAM-691508.**

**BY ADV.S SMT.K.G.BINDU
SMT.T.S.MAYA (THIYADIL)**

**THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION
ON 28-10-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

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C.R.

P.B.SURESH KUMAR, J.

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R.S.A.No.1106 of 2015.

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Dated this the 28th day of October, 2015.

J U D G M E N T

The plaintiff in the suit is the appellant in this Second Appeal.

2. The suit was one for setting aside the decree and judgment in an earlier suit in respect of the suit property. The fact that the suit property belonged to the plaintiff is not in dispute. According to the plaintiff, she entrusted the title deed of the property with one Dr.K.R.Thankappan with whom she was living to enable him to raise a loan; that a few persons attempted to install a gate in front of the suit property on 15.9.2008 and that the enquiry made by the plaintiff thereafter revealed that Dr.K.R.Thankappan borrowed money from the defendant

against the security of the title deed of the suit property and since Dr.K.R.Thankappan did not repay the loan, the defendant created a false agreement for sale in respect of the suit property and filed a suit as O.S.No.470 of 1992 and obtained a decree for specific performance in respect of the suit property. It is alleged by the plaintiff that she did not receive summons from the court in the said suit and pursuant to the exparte decree obtained by the defendant, he got the sale deed of the property executed through the process of the court. It is specifically alleged by the plaintiff in the suit that she came to know of the suit and the decree only on 17.9.2008. According to the plaintiff, the decree obtained by the defendant in O.S.No.470 of 1992 is not binding on the suit property as the same is vitiated by fraud and hence the suit. The defendant resisted the suit contending that the plaintiff has executed an agreement for sale in respect of the suit property on 10.4.1991 in his favour, after receiving a sum of Rs.70,000/- by way of advance sale consideration and that since the suit property

was not conveyed as per the terms of the said agreement, he filed O.S.No.470 of 1992 and obtained a decree for specific performance of the agreement for sale and got delivery of the property through the process of the court in execution of the said decree. It is specifically contended by the defendant in the written statement that the plaintiff had received summons from the court in the suit filed by him and she had filed a written statement also in the suit. In other words, according to the defendant, the allegation in the plaint that the plaintiff knew about the decree and judgment in O.S.No.470 of 1992 only on 17.9.2008 is incorrect and since the plaintiff was aware of the decree and judgment in O.S.No.470 of 1992, the suit instituted in the year 2008 is barred by limitation.

3. The trial court considered the issue of limitation raised by the defendant as a preliminary issue and rejected the plaint invoking Rule 11(d) of Order VII of the Code of Civil Procedure ('the Code' for short) holding that the plaintiff was aware of the suit O.S.No.470 of 1992 and

therefore, the suit is barred by limitation. The plaintiff though took up the matter in appeal, the appellate court confirmed the decision of the trial court. Hence this Second Appeal by the plaintiff.

4. Heard the learned counsel for the appellant/plaintiff as also the learned counsel for the respondent/defendant who appeared through caveat.

5. The learned counsel for the appellant contended that the power of the court under Rule 11(d) of Order VII of the Code for rejecting a plaint on the ground of limitation can be invoked only where the statements made by the plaintiff in the plaint discloses that the suit is barred by limitation and that the said power cannot be invoked if the statements in the plaint do not indicate that the suit is barred by limitation. It was pointed out by the learned counsel that the plaint in the present case does not indicate that the suit is barred by limitation and that the impugned judgments are rendered by the courts below based on the pleadings of the defendant in the written statement filed by

him as also the documents produced by him. The learned counsel for the respondent did not dispute the fact the impugned decisions are rendered based on the pleadings in the written statement filed by him as also the documents produced by him. However, the learned counsel attempted to support the decisions of the courts below contending that merely for the reason that the courts below have reckoned the pleadings of the defendant in the written statement, it cannot be said that the exercise of power under Rule 11(d) of Order VII of the Code by the courts is bad.

6. In the light of the submissions made at the Bar, the question of law arising for consideration in the Second Appeal is whether the court is empowered to consider the pleadings of the defendant and the documents produced by him while exercising the power under Rule 11 (d) of Order VII of the Code. Rule 11 of Order VII of the Code reads thus:

“11.Rejection of plaint --The plaint shall be rejected in the following cases :--

(a) where it does not disclose a cause of action;

- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;
- (e) where it is not filed in duplicate;
- (f) where the plaintiff fails to comply with the provisions of rule 9; [provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature for correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]”

It is explicit from the rule that when it appears from the statement in the plaint that the suit is barred by any law, the court is empowered to reject the plaint. In other words, the said power can be invoked by the court only when the statement in the plaint, without any doubt or dispute, discloses that the suit is barred by limitation. The court,

therefore, is not empowered to consider the case of the defendant at the stage of invoking the power under clause (d) of Rule 11 of the Code. [See **Popat and Kotecha Property v. State Bank of India Staff Association** [(2005)7 SCC 510].

7. The suit in the instant case being one to set aside a decree and judgment in a previous suit, as rightly pointed out by the appellate court, the relevant article applicable is Article 59 of the Schedule to the Limitation Act. As per Article 59, the period of limitation begins to run when the facts entitling the plaintiff to have the decree set aside first become known to him. As noticed above, the specific case pleaded by the plaintiff in the plaint is that she came to know about the decree and judgment in O.S.No.470 of 1992 only on 17.9.2008. As such, going by the statements in the plaint, the suit is not barred by limitation. It is beyond dispute that the parties have not adduced evidence in the suit. The impugned decisions indicate that the plaint is rejected by the courts below on the ground that the suit is

barred by limitation holding that the statement made by the plaintiff in the plaint that she came to know of the decree and judgment in O.S.No.470 of 1992 only on 17.9.2008 is incorrect. In other words, the plea of limitation raised by the defendant is decided against the plaintiff on an adjudication as to the correctness of the statement made by the plaintiff in the plaint that she has come to know of the decision in O.S.No.470 of 1992 only on 17.9.2008. As noticed above, the said adjudication has been made on the basis of the pleadings of the defendant in the written statement filed by him as also the documents produced by him. As stated above, the course adopted by the courts below in rejecting the plaint on the ground of limitation is impermissible in law. That does not mean that the defendant is not entitled to seek dismissal of the suit on the ground of limitation, if he is able to show that the plaintiff has received summons in O.S.No.470 of 1992 and that the statement made by the plaintiff that she came to know of the decision in O.S.No.470 of 1992 only on 17.9.2008 is

incorrect. The said course can be adopted by the defendant at the appropriate stage of the proceedings.

In the result, the Second Appeal is allowed. The impugned decisions of the courts below are set aside and the suit O.S.No.470 of 1992 on the file of the Sub Court, Kollam is remitted for fresh disposal. Having regard to the facts and circumstances of the case, I deem it appropriate to direct the court below to dispose of the suit as expeditiously as possible, at any rate, within a period of three months from the date of receipt of a copy of this judgment.

**Sd/-
P.B.SURESH KUMAR,
(JUDGE)**

kvs

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PA TO JUDGE.