

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

WEDNESDAY, THE 7TH DAY OF JANUARY 2015/17TH POUSHA, 1936

SA.No. 631 of 2002 (A)

AS 273/1997 of 1ST ADDITIONAL DISTRICT COURT, THRISSUR
OS 379/1987 of ADDITIONAL SUB COURT, IRINJALAKUDA

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APPELLANT(S)/LEGAL REPRESENTATIVES OF PLAINTIFF AIDRU/APPELLANTS:

- * 1. AYISU, W/O. LATE AIDRU,
THEWARAKKATTIL HOUSE, KAIPPAMANGALAM VILLAGE,
P.O. KAIPPAMANGALAM-680 681, KODUNGALLUR TALUK,
TRICHUR DISTRICT. (DIED) LRS RECORDED.
- * IT IS RECORDED THAT THE 1ST APPELLANT DIED AND HER LEGAL
REPRESENTATIVES ARE ALREADY ON RECORD AS APPELLANTS 2 TO 9 AS
PER ORDER DTD.30.7.2003 VIDE MEMO CF 3063/2003 DATED 09-07-2003.
- 2. ABDULLA, S/O. LATE AIDRU,
-DO- -DO- -DO-.
- 3. HAMSA, S/O. LATE AIDRU,
-DO- -DO- -DO-.
- 4. KOCHUKADEEJA, D/O. LATE AIDRU,
-DO- -DO- -DO-.
- 5. SUHARA, D/O. LATE AIDRU,
-DO- -DO- -DO-.
- 6. RAMLA, D/O. LATE AIDRU,
-DO- -DO- -DO-.
- 7. SAFIA, D/O. LATE AIDRU,
-DO- -DO- -DO-.

BY ADVS.SRI.N.SUBRAMANIAM
SRI.M.S.NARAYANAN
SRI.P.T.GIRIJAN
SMT.USHA NARAYANAN

RESPONDENT(S)/DEFENDANTS/RESPONDENTS:

- 1. SAIDU, S/O. PALLIPARAMBIL ADIMAHAJI,
P.O.KAIPPAMANGALAM-680 681, KODUNGALLUR TALUK,
TRICHUR DISTRICT.

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2. RABIA, W/O. ISMAIL,
CHANDANAPARAMBIL HOUSE, NATTIKA VILLAGE,
P.O. NATTIKA-680 572, CHAVAKKAD TALUK,
TRICHUR DISTRICT.
3. ISMAIL, S/O. MUHAMMED MUSALIYAR,
-DO- -DO-.
4. ABDUL KHADER, S/O. MUHAMMED,
PARAKKOTTIL HOUSE, SREENARAYANAPURAM VILLAGE,
P.O. SANTHAPURAM-680 668, KODUNGALLOOR TALUK,
THRISSUR DISTRICT.
5. BEERU, S/O. MUHAMMED, -DO- -DO-
6. SAIDU, S/O. MUHAMMED, -DO- -DO-
7. YOUSEFF, S/O. MUHAMMED, -DO- -DO-

R2 & R3 BY ADV. SRI.S.VINOD BHAT

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON
21-11-2014 ALONG WITH RSA. 380/2012, THE COURT ON
07-01-2015, DELIVERED THE FOLLOWING:

msv/

'C.R'

A.V.RAMAKRISHNA PILLAI, J.

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S.A No.631 of 2002

and

R.S.A No.380 of 2012

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Dated this the 7th day of January, 2015

JUDGMENT

The legal representatives of the sole plaintiff, who has instituted two separate suits before the trial court, have come up with these appeals.

2. One Ayidru, of whom appellants are the legal representatives, filed two suits as O.S Nos.378 of 1987 and 379 of 1987 before the Sub Court, Irinjalakkuda. O.S No.378 of 1987 was for declaration that Sale Deed No.1619/1977 is only a mortgage deed, as the parties intended to execute only a mortgage deed as security for the loan advanced and for permitting the plaintiff to pay back ₹4,400/- and to get back the properties from respondents 1 and 2.

3. The plaintiff alleged that in order to protect his properties having an extent of 61 cents in Sy. Nos.867/3 & 367/2 from sale in

court auction by Dharmodayam Company, Trichur, in a suit filed by them as O.S No.45 of 1973, which was decreed in favour of the company, respondents 1 and 2 agreed to help late Ayidru. However, they wanted security for the loan to be advanced by them. The document was written as sale deed in favour of respondents 1 and 2. However, there was a simultaneous oral agreement between the parties that the buyers would re-convey the property on payment of ₹4,400/- with interest. When the said money with interest was offered, the buyers refused to execute re-conveyance deed. Thus, the suit.

4. In O.S No.379 of 1987, the plaintiff and defendants 3 and 4 are the same as in O.S No.378 of 1987. Defendants 1 and 2 are one Saidu and one Muhammed respectively. Except the suit property, defendants 1 and 2 and the documents sought to be set aside, other pleadings and statement of facts in O.S No.379 of 1987 are similar to that of the pleadings in O.S No.378 of 1987. In O.S No.379 of 1987, there is a prayer for declaration that document no.1618/1977 permitted to create only a mortgage

transaction and the plaintiff is entitled to redeem the property. As per plaint averments, the suit properties in both the suits are lying adjacent contiguously.

5. The defendants resisted the suits contending that the documents were sale deeds and they cannot return the properties. They further contended that entire one acre and one cent of property came into the ownership of defendants 3 and 4 as per Exts.B5 to B8. They also contended that there was no agreement to return the property when the money was paid back. According to them, possession was given to them on the dates of documents and the story that forceful eviction set up by the plaintiff was also not true. They also contended that the suits are barred by limitation and the plaintiff is not entitled to the benefit of Section 14 of the Limitation Act.

6. Defendants 3 and 4 through separate written statements contended that they are subsequent *bona fide* purchasers. They adopted the contentions of the defendants 1 and 2. They also contended that the plaintiff cannot be permitted to ignore Sections

91 and 92 of the Evidence Act and Section 41 of the Transfer of Property Act.

7. The trial court after raising proper issues ordered joint trial of both the suits treating O.S No.378 of 1987 as the leading case. At the trial, PWs.1 to 5 as well as DWs.1 to 3 were examined and Exts.A1 to A14 and B1 to B8 were marked. During the pendency of trial, the second defendant in O.S No.378 of 1987 died and his legal heirs were impleaded as defendants 5 to 8. The trial court after considering the evidence, dismissed the suits. The matters were taken in appeal before the lower Appellate Court which after reconsideration of the evidence dismissed the appeals confirming the judgment and decree of the trial court.

8. The appellants took the matter before this Court in S.A Nos.631 of 2002 and 629 of 2002. S.A No.629 of 2002 was against the judgment in A.S No.272 of 1997 which in turn was against the judgment in O.S No.378 of 1987. S.A No.631 of 2002 was against A.S No.273 of 1997 which in turn was against the judgment in O.S No.379 of 1987. S.A No.629 of 2002 was

disposed of setting aside the judgment in A.S No.279 of 1997 and the case was remitted back to the lower appellate court for fresh disposal after impleading the legal heirs of the second respondent, who died while the appeal was pending before the appellate court. Thus, respondents 5 to 11, the legal heirs of the second respondent were impleaded. The lower appellate court again reconsidered the issue after hearing the appellants and the legal heirs of the deceased second respondent and dismissed A.S No.272 of 1997. It is against the said judgment R.S.A No.380 of 2012 is filed.

9. Arguments have been heard.

10. One of the reasons pointed out by the courts below in non suiting the appellants was on the assumption that the limitation period commenced on the date of Ext.A2 i.e. on 01.10.1977. The learned counsel for the appellants would argue that the courts below had gone wrong in finding that the suit was barred by limitation and that under Section 14 of the Limitation Act, the plaintiff is not entitled to exclude the period during which DROP Nos.23/80 and 24/80 were pending and the suit should have

been filed on or before 06.06.1985 and the suit having been filed on 24.08.1985 was barred by limitation.

11. Here, the learned counsel for the appellants would argue that the appellants filed DROPs under the provisions of Agricultural and Debt Relief Act, 1970 requesting the Munsiff's Court to decide the nature of transaction involved as to whether the alleged sale deed was a sale deed or a mortgage deed and if it was found to be mortgage deed, to permit the plaintiff to deposit that money in court and to order return of the properties involved in the documents. The Munsiff's Court dismissed the two DROPs and, therefore, the sole plaintiff filed C.M.As which were also dismissed as per Ext.A11 as being not maintainable on 29.05.1985.

12. According to the appellants, copy applications were made on 30.05.1985 and it was delivered on 21.08.1985. It was thereafter the present suit was filed on 24.08.1985 as P.O.P No.42 of 1985 which was allowed and the O.P was numbered as O.S No.378 of 1987. The plaintiff claimed the benefit of Section 14 of the Limitation Act, in view of the pendency of the DROPs and the

appeals.

13. The learned counsel for the appellants would argue that in computing the time during which the plaintiff has been prosecuting another civil proceedings in a Court of Appeal with due diligence, the time requisite for obtaining certified copies under Section 12 has to be excluded. It was argued that the certified copy alone would show the result of judgment and only after getting the certified copy, one can decide whether he should take up further steps or to file a fresh suit. Therefore, it was argued that the suit filed on 24.08.1985 is in time.

14. The courts below found that the DROPs have been filed two years eleven months and twenty two days after the documents were executed on 01.10.1977 and, therefore, only eight days have remained for filing the suit and the suit should have been filed on or before 06.06.1985, taking the date of judgment in CMA as 29.05.1985 for calculation. According to the learned counsel for the appellants, this finding is wrong and the suit filed within three days after the certified copy is in time.

15. In order to understand the import of Section 14 of the Limitation Act, it is profitable to quote Section 14 which reads as follows:

“Exclusion of time of proceeding *bona fide* in court without jurisdiction.- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.-- For the purposes of this section,--

- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
- (b) a plaintiff or on applicant resisting an appeal shall be deemed to be prosecuting a proceeding.
- (c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

16. It is crucial to note that Section 14(1) of the Limitation Act makes no reference to the pendency of suit or appeal or other proceedings in a court of law. The Legislature had used the words of general import and of widest amplitude If only pendency of a

proceeding in a court would be deducted in computing the period of limitation, the time taken for issuing certified copies of the judgment which is essential to decide future course of action, has to be disregarded for the purpose of Section 14. It would certainly result in an anomaly. That time covered for taking steps absolutely necessary for initiating proceedings in a court should be included in calculating the period of limitation. The section does not make any distinction between the steps which a litigant has to take to initiate proceedings in a court and the actual pendency of those proceedings in the court. In other words, Section 14 of the Limitation Act excludes not only the period of pendency of infructuous proceedings in a court of law, but also the time occupied for taking indispensable and preparatory steps to institute further proceedings like obtaining certified copies of the judgments and orders.

17. In the instant case, the reliefs claimed in DROPs under Section 9 of Agricultural Debt Relief Act, 1970 and the reliefs claimed in the suits are the same. Parties are also same in both the

proceedings. The subject matter is also the same. The appellants had been prosecuting the DROPs and CMAs thereby diligently and bona fide. In such a case, the court below should have found that the appellant/plaintiff is entitled to the benefit of Section 14 of the Limitation Act. Therefore, the finding of the court below to that effect is wrong and has to be interfered with.

18. Now the remaining question is whether Ext.A3 was only a mortgage deed or whether it was an out and out sale. According to the appellants, though Ext.B1 was executed in the form of a sale deed, the understanding was that it should be treated only as a mortgage deed. The appellants claimed that it is only a possessory mortgage in tune with the custom prevailing in the locality. It is true that in prayer A there is a passing mention that such a custom was prevailing in the locality. However in the body of the plaint, there is no sufficient pleading to that effect and no evidence has been let in to substantiate the nature of customary mortgage.

19. The court below found that the contention of the appellants that the loan was obtained from defendants 1 and 2 for

the discharge of decree debt was bound to fail. Here, it is relevant to note that the Ext.B1 dated 1.10.1977 had come into existence after the entire decree debt due to Dharmodayam Company has already been discharged and full satisfaction was recorded as Ext.A8 on 4.10.1976. That is the reason why the trial court refused to believe the case set up by the plaintiff. It was argued that the transaction being harsh and unconscionable bargain for a nominal consideration, supports the theory of a loan transaction more than a sale. It was also argued that an unconscionable contract is such an agreement as no sane man, not acting under proper senses, would make and that a honest man would take advantage of.

20. The contention of the respondents/defendants is that Ext.B1 is unambiguous in terms which discloses that it was a sale deed. The lower appellate court after elaborate consideration of the evidence found that the contention of the appellant/plaintiff that the loan was sought from defendants 1 and 2 for the discharge of decree debt due to Dharmodayam Company cannot be accepted.

The contention of the appellants that they never intended to execute an out-and-out sale in favour of defendants and that there was an oral agreement regarding re-conveyance would disprove their case. If the plaintiff/appellant has a case that there was an oral agreement then it presupposes the execution of a sale deed. It is crucial to note that the appellants have not filed any suit for specific performance on the basis of the oral agreement.

21. Though the appellant/plaintiff has pleaded that defendants 1 and 2 had insisted for execution of a document in the form of a sale deed which conveys the idea that the sale deed was executed on the basis of prior mutual understanding between the parties, while tendering evidence the appellant/plaintiff stated that he came to know for the first time that the document was executed in the form of a sale deed, only when it was read over to him on the date of execution. This is also a relevant circumstance to disbelieve the case of the appellant/plaintiff.

On a consideration of the entire materials now placed on record, this Court is of the definite view that the appellants are

not entitled to succeed. The courts below have appreciated the evidence on facts in the correct perspective and have arrived at the correct conclusion, which does not call for interference by this Court.

In the result, the appeals fail and accordingly, they are dismissed. No order as to costs.

Sd/-

A. V. RAMAKRISHA PILLAI
JUDGE

krj

/True Copy/

PA to Judge