IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 24TH DAY OF JULY 2024 / 2ND SRAVANA, 1946

RSA NO. 109 OF 2023

AGAINST THE JUDGMENT AND DECREE DATED 30.9.2022 IN AS NO.19 OF 2019 OF ADDITIONAL SUB COURT-II, THRISSUR ARISING OUT OF THE JUDGMENT AND DECREE IN OS NO.545 OF 2011 OF MUNSIFF COURT, WADAKANCHERY

APPELLANT/2ND APPELLANT/LEGAL HEIR OF THE 1ST DEFENDANT:

GANGADHARAN T.V.,
AGED 50 YEARS, S/O.THURUTHIKKATTIL VELAYUDHAN,
POOMALA DESOM, THEKKUMKARA VILLAGE, THALAPPILLY TALUK,
THRISSUR DISTRICT, PIN - 680581

BY ADV P.K.SAJEEV

RESPONDENTS/RESPONDENTS/PLAINTIFF & DEFENDANTS 2 & 3 :

1 **JEEVAN AMBATT @ JAGAJEEVAN**
AGED 43 YEARS, S/O.VELAYUDHAN KUNNATH
@ AMBATT HOUSE, KALLAMPARAMBU, VADAKKETHARA, PAZHAYANNUR,
THALAPPILLY TALUK, THRISSUR, PIN - 680587

2 **YAMUNA**
AGED 38 YEARS
D/O.VELAYUDHAN, THURUTHIKKATTIL VEEDU, POOMALA P.O.,
THEKKUMKARA VILLAGE, THRISSUR, PIN - 680581

3 **SINDHU**
AGED 33 YEARS
D/O.VELAYUDHAN, THURUTHIKKATTIL VEEDU, POOMALA P.O.,
THEKKUMKARA VILLAGE, THRISSUR - 680 581.

R1 BY ADVS.
SHIBIN K.F.

SEBY JOSEPH(K/71/1996)
R2 & R3 BY ADV.P.RAMACHANDRAN

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 26.06.2024, THE COURT ON 24.7.2024 DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 24th day of July, 2024

This Regular Second Appeal has been filed under Order XLII Rule 1 and Section 100 of the Code of Civil Procedure, assailing the decree and judgment in A.S.No.19/2019 on the files of the Additional Sub Court-II, Thrissur, arose out of the decree and judgment in O.S.No.545/2011 on the files of the Munsiff Court, Wadakanchery.

2. Heard the learned counsel for the appellant/legal heir of the 1st defendant in the suit as well as the learned counsel appearing for the 1st respondent, who is the plaintiff in O.S.No.545/2011.

3. I have perused the relevant documents and the decisions placed by both sides.

4. I shall refer the parties in this appeal as 'plaintiff', 'legal heir of the 1st defendant' and '3rd defendant' for convenience.

5. Facts of the case:

The plaintiff, who obtained joint right over the plaint schedule property on the basis of an auction purchase in a court sale, had filed the present suit, seeking partition of his ¼ share in the property.

6. The 1st defendant filed written statement contending that she obtained exclusive ownership and possession over the plaint schedule property by a Will deed executed by Velayudhan (husband of the 1st defendant). It was also contended that, as per the verdict in O.S.No.183/2010, the genuineness of the Will deed, which was found in favour of the 1st defendant, was found to be properly executed.

7. After filing written statement, the plaintiff filed replication, challenging the execution and genuineness of the Will on the submission that the same is the outcome of fraud, so as to hold the same as not binding on the plaintiff.

8. The trial court recorded evidence. PW1 was examined and Exts.A1 to A20 were marked on the side of

the plaintiff. DW1 was examined and Exts.B1 to B10 were marked on the side of the defendants.

9. Finally, the trial court decreed the suit and passed preliminary decree for partition. The preliminary decree was challenged in A.S.No.19/2019 and the learned Additional Sub Judge, Thrissur confirmed the finding of the trial court. Thus, this Second Appeal.

10. Heard both sides in detail on admission on 25.6.2024. Appeal got admitted on 25.6.2024, raising the following substantial questions of law:

1) What is the legal impact of Section 44 of the Indian Evidence Act, 1872? (for short, 'the Act, 1872' hereinafter)

2) Is it necessary to institute a separate proceeding to set aside decree and judgment in a previous suit, when plaintiff is able to show that it was delivered by a court, not competent to deliver it or the same were obtained by fraud or collusion?

3) Can a litigant, who is not a party to the

previous litigation, is able to avoid a verdict in a previous litigation, merely alleging fraud in obtaining the same with the aid of Section 44 of the Act, 1872, without filing a suit to set aside the same?

11. A point raised by the learned counsel for the appellant/the legal heir of the 1st defendant, is that, based on Ext.A19 verdict in O.S.No.183/2010, a suit filed by the 3rd defendant/3rd respondent herein against the 1st defendant and other legal heirs, whereby, the court found the genuineness of the Will executed by Velayudhan in favour of the 1st defendant and therefore, without challenging the legality of Ext.A19 judgment, the trial court as well as the appellate court went wrong in passing preliminary decree, ignoring Ext.A19, since there is no prayer either to set aside or to ignore Ext.A19 judgment and the decree thereof.

12. In this connection, the learned counsel for the appellant/legal heir of the 1st defendant placed a three bench decision of the Hon'ble Apex Court in **Union of**

India and Others v. **Major S.P.Sharma and Others**, reported in **[2014 KHC 4154]** with reference to paragraph No.70 of the above judgment. In paragraph No.70, the Hon'ble Apex Court held as under:

> *70. A decision rendered by a competent Court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning."*

13. The learned counsel also placed a two bench decision in **Chandro Devi** v. **Union of India and Others** reported in **[2017 KHC 6639]**, where the Hon'ble Apex Court, after referring Section 44 of the Act, 1872, held that, *there could be no dispute at the proposition that, if there is fraud, which leads to passing of a judgment, then fraud vitiates all actions taken consequent to such fraud and this would mean that the judgment would be set aside*.

14. Another decision of the Hon'ble Apex Court in

Union of India and Another v. **M/s.K.C.Sharma & Co. and Others** reported in **[2020 KHC 6486]** with reference to paragraph No.12, where the Hon'ble Apex Court held as under:

> *"It is fairly well settled that fraud has to be pleaded and proved. More so, when a judgment and decree passed earlier by the competent court is questioned, it is necessary to plead alleged fraud by necessary particulars and same has to be proved by cogent evidence. There cannot be any inference contrary to record. As the evidence on record discloses that fraud, as pleaded, was not established, in absence of any necessary pleading giving particulars of fraud, we are of the view that no case is made out to interfere with the well reasoned judgment of the High Court. The case law in this regard submitted by the learned ASG for the appellants would not render any assistance to support their plea. Further cases referred in the case of Associated Hotels and C.M. Beena, (2004) 3 SCC 595 also will not come to the rescue of the case of the appellants in any manner. As it is clear from the evidence that the*

respondents were put in possession and they continued in possession by cultivating the land the said judgments would not render any assistance in support of the case of the appellants. On the other hand in the case of Maneklal Mansukhbhai, AIR 1950 SC 1 relied on by learned senior counsel for the respondents it is clearly held by this Court that defence under S.53A of the Transfer of Property Act, 1882 is available to a person who has agreement of lease in his favour though no lease has been executed and registered."

15. Another decision in **Embassy Hotels Pvt.Ltd.** v. **M/s. Gajaraj & Co. and Others** reported in **[2015 KHC 5380]** is also placed with reference to paragraph Nos.20 and 21 to substantiate the argument tendered by the learned counsel for the legal heir of the 1st defendant and the same are extracted hereunder:

20. No doubt, if a fraud is alleged and proved, it can be sufficient to get rid of most solemn of proceedings including court proceedings. But in case of order of a court of competent jurisdiction, this must be done only by throwing a direct challenge to the

proceedings by instituting a suit for that purpose or through any appropriate legal proceeding which may permit such direct challenge. Judgments of courts cannot be ignored by another court in a collateral proceeding and that also on mere suspicion of fraud or collusion, as has been done in this case.

21. Learned counsel for the appellant has rightly placed reliance for this purpose on paragraph 76 of a recent judgment of this Court in the case of Union of India vs. Major S.P. Sharma, 2014 (6) SCC 351. Paragraph 76 of the judgment reads as follows:

> "*76. A decision rendered by a competent court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning.*"

16. Similarly, a decision of this Court in **Mammad P.K.** v. **Competent Authority and Special Deputy**

Collector reported in **[2023 (2) KHC 464 : 2023 KER 14584 : 2023 (2) KLT 309 : 2023 (2) KLJ 120]** also is placed with reference to paragraph No.4, wherein, this Court held as under:

> *A reading of the judgment of the Supreme Court in Asharfi Lal (supra), in my view does not lead to the conclusion that whenever a decree is pressed into service for the purpose of establishing title or any other right, a party opposing it can by simply raising an objection that certain documents were not brought to the notice of the Court passing the decree, seek to avoid it by applying the principle contained in S.44 of the Indian Evidence Act, 1872. A reading of the judgment of the Supreme Court suggests that if the failure to bring to the notice of the Court passing the decree, a pertinent document or fact, was a case of negligence, the party to a decree cannot seek to avoid it by relying on the principle contained in S.44 of the Indian Evidence Act, 1872, unless that negligence is purposeful and a product of fraud. The decree which is sought to be avoided, in this*

case, does not fall within S.44 of the Indian Evidence Act 1872.

17. Apart from the above, a three bench decision of the Hon'ble Apex Court in **Asharfi Lal** v. **Smt.Koili (dead) by L.Rs.** reported in **[1995 KHC 863]** to contend that, in order to avoid a decree without specific challenge, it is permissible only under Section 44 of the Act, 1872, where such a plea is raised and proved.

18. The learned counsel for the 1st respondent/plaintiff also relied on the decision of **Asharfi Lal** v. **Smt.Koili (dead) by L.Rs.** (supra) to resist the contention raised by the learned counsel for the appellant/legal heir of the 1st defendant, with reference to paragraph No.8 of the above judgment. Paragraph No.8 of the above judgment is as under:

8. The judgment of a competent Court is normally binding on the parties to the proceeding and it operates as res judicata in a subsequent proceeding between the same parties. An exception to the said rule is engrafted by S.44 of the Evidence Act

which provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under S.40, 41 and 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The effect of the said provision is that a judgment delivered by a Court not competent to deliver it or a judgment which is obtained by fraud or collusion does not operate as res judicata and is not binding on the parties to the said proceedings. [See: Beli Ram and Brothers v. Chaudhri Mohammad Afzal. AIR 1948 PC 168]. A judgment can be avoided in a subsequent proceeding by a party which is able to show that it was delivered by a Court not competent to deliver it or it was obtained by fraud or collusion. Since such a judgment does not operate as res judicata it is not necessary to institute a proceeding for setting it aside. A party to a proceeding against whom a judgment in an earlier suit is relied can successfully avoid the said judgment if he can establish in the subsequent proceeding that the said judgment was delivered by a Court not

competent to deliver it or that it was obtained by fraud or collusion.

19. The learned counsel also placed another decision of the Hon'ble Apex Court in **Kishan Lal Barwa** v. **Sharda Saharan and Another** reported in **[2015 (0) Supreme (All) 144]**, where the Hon'ble Apex Court held that, '*under Section 44 of the Evidence Act any party to a suit or other proceeding may show that any judgment, order or decree, which it or was obtained by fraud or collusion. The provision of Section 44 is not an idle provision. If it is proved that a judgment was obtained by collusion that fact will affect its force, effect, executability and value. So it will be absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains*'.

20. The question raised by the learned counsel for the appellant/legal heir of the 1st defendant requires answer, after referring Section 44 of the Act, 1872, with the aid of the decisions on this point. Here, evidently, a suit was filed as O.S.No.174/2008 by the plaintiff against Gangadharan for recovery of money and the said suit was decreed and on execution, the plaintiff obtained title to ¼ share of Gangadharan over the plaint schedule property, as per court sale and sale certificate was issued. Thereafter, the plaintiff filed the present suit for partition of his ¼ share on the basis of the purchase certificate he obtained and that suit was resisted. One among the contentions raised by the other side to resist the claim for partition is that, the right of Gangadharan was given a go-bye by the verdict in O.S.No.183/2010, i.e., Ext.A19. Replication was filed by the plaintiff contending that Ext.A19 judgment and the decree thereof are the outcome of fraud and therefore, the plaintiff could very well avoid the same, in the subsequent proceedings.

21. According to the learned counsel for the

plaintiff, decree and judgment in O.S.No.183/2010 were generated as the outcome of fraud and therefore, the same are non-est in the eye of law. Be it so, no formal declaration is required that the same are null and void and not binding on the plaintiff. The point argued by the learned counsel for the appellant/legal heir of the 1st defendant is that, in such cases also, the same would come under the category of collateral purposes and without a specific challenge against the decree and judgment, the same could not be ignored.

22. Section 44 of the Indian Evidence Act, 1872 reads as under:

> ***44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.–***–*Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.*

23. Thus, the legal position emerges is that, the judgment of a competent Court is normally binding on the parties to the proceeding and it operates as res judicata in a subsequent proceeding between the same parties. An exception to the said rule is engrafted by Section 44 of the Act, 1872 which provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41 and 42 of the Act, 1872, and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The effect of the said provision is that a judgment delivered by a Court not competent to deliver it or a judgment which is obtained by fraud or collusion does not operate as res judicata and is not binding on the parties to the said proceedings. A judgment can be avoided in a subsequent proceeding by a party who is able to show that it was delivered by a Court not competent to deliver it or it was obtained by fraud or collusion. Since such a judgment does not operate as *res judicata* it is not necessary to institute a proceeding for

setting it aside. A party to a proceeding against whom a judgment in an earlier suit is relied, can successfully avoid the said judgment, if he can establish in the subsequent proceeding that the said judgment was delivered by a Court not competent to deliver it or that it was obtained by fraud or collusion. Section 44 of the Act, 1872 is not an idle provision to ignore without being applied. It is absolutely incorrect to say that even if a judgment is obtained by fraud or collusion that will operate as res judicata in a subsequent suit. That will be giving premium to sham and illegal deals, shutting out persons striving to uphold their rightful cause or claim by exposing illegal or unconscionable bargains.

24. Answering the substantial questions of law, it is held that, Section 44 of the Act, 1872 carves out an exception to the general rule that, in order to avoid a judgment, order or decree, a suit has to be filed, challenging the same supported by cogent reasons, to establish the same. The exception would apply in two contingencies dealt under Section 44 of the Act, 1872,

viz., *1) Any judgment, order or decree was delivered by a court, not competent to deliver it and 2) Any judgment, order or decree was obtained by fraud or collusion*. Thus, parties to a suit could very well avoid the verdict thereof with the aid of Section 44 of the Act, 1872, specifically covered by the two contingencies extracted above. No doubt, apart from the above two contingencies, filing a suit to declare the verdict as null and void or binding upon the plaintiff, is the procedure to be followed. The corollary is that, it is not necessary for a party to a suit in the previous proceedings, to institute a separate proceedings to set aside judgment, order or decree in a previous suit, when he is able to show that, it was delivered by a court, not competent to deliver it or the same was obtained by fraud or collusion, in consonance with Section 44 of the Act, 1872. The substantial questions of law answered thus.

25. It is also held that, insofar as a third party to a proceedings is concerned, he could very well avoid a judgment, order or decree, passed without he being a

party therein, and for which, he need not file a suit or other proceedings to get the verdict declared null and void or not binding upon him.

26. Having made the legal position so clear, in the instant case, the verdict impugned herein, is perfectly justified and no interference is called for.

In the result, this Regular Second Appeal fails and is dismissed.

All interlocutory orders stand vacated and all interlocutory applications pending in this Regular Second Appeal, stand dismissed.

Registry shall inform this matter to the trial court as well as the appellate court, forthwith.

Sd/-
A. BADHARUDEEN
JUDGE

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