

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 18TH DAY OF OCTOBER 2023 / 26TH ASWINA, 1945

EX.SA NO. 12 OF 2015

AGAINST THE JUDGMENT DATED 07.02.2015 IN A.S.NO.248/2012 OF
DISTRICT COURT, PALAKKAD IN EA.NO.253/2005 IN E.P.NO.236/2004 IN
O.S.NO.597/1991 OF PRINCIPAL MUNSIF COURT, PALAKKAD

APPELLANT/APPELLANT/PETITIONER

VELUSWAMY
S/O.KUNJAPPAN PILLAI, CHULLIMADA,
PUTHUSSERY AMSOM AND DESOM,
PALAKKAD TALUK.

BY ADV SRI.P.R.VENKATESH

RESPONDENTS/RESPONDENTS/RESPONDENTS

- 1 PONNU, (DIED)
X
- 2 NARAYANI,
D/O.PONNU, PAMPAM PALLAM, PUDUSSERY, PALAKKAD-678 621.
- 3 RAMACHANDRAN,
S/O.MUTHU, PAMPAM PALLAM, PUDUSSERY, PALAKKAD-678 621.
- 4 KALAVATHY,
W/O.VELUSWAMY, RESIDING AT CHULLIMADA,
PUDUSSERY AMSOM, PALAKKAD TALUK-678 007.

BY ADVS.
FOR R3 SAJAN VARGHEESE K.
FOR R3 LIJU. M.P

THIS EXECUTION SECOND APPEAL HAVING COME UP FOR ADMISSION ON
18.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 18th day of October, 2023

This appeal arises out of the decree and judgment as AS No.248/2012 on the files of the 1st Additional District Court, Palakkad, arising out of EA No.253/2005 in EP No.236/2004 in OS No.597/1991 on the files of Principal Munsiff Court, Palakkad. The appellant is the claim petitioner in EA 253/2005. The respondents in the EA are the decree holders as well as judgment debtors.

2. As per order dated 24.06.2015, this Court admitted this appeal, raising the following substantial questions of law.

“(i) Should not the courts below have found that the decree obtained by the decree holder in another suit for specific performance cannot affect the right of the appellant who holds the property with an independent title under Ext.A1 purchase certificate?”

“(ii) Should not the courts below have found that the decree passed in OS No.597/1991 is not binding on the appellant and therefore the independent right claimed by the appellant as per Ext.A1 cannot in any manner be prejudicially affected for the mere reason that the subject matter in both the suits happened to be one and the same and his wife

happened to be the plaintiff in OS No.363/1995?

(iii) Is the order passed by the court below touching the Commission Report against the direction in the judgment in OP(C) No.2827/2011 of this Court?"

3. Heard the learned counsel for the appellant and also the learned counsel for the 3rd respondent, who is the decree holder. No others appeared, despite service of notice.

4. The parties in this appeal shall be referred as 'claimant', 'decree holder' and 'judgment debtors', hereafter for convenience.

5. EA No.253/2005 had been filed before the trial court by the claim petitioner contending that he obtained plaint 'A' scheduled items 1 to 13 having an extent of 6.81 acres as per a 'patta' obtained in OA No. 3103/72 and purchase certificate No.466/1976. The specific contention raised by the claim petitioner before the Execution Court was that the said properties are in his possession and

enjoyment and out of it, he had gifted certain item of properties in favour of his daughter Uma Maheswari as per document No.423/2001 and now the said property had been in possession and enjoyment of Uma Maheswari. The sum and substance averred in the claim petition is that now the decree holder is attempting to make part of 'A' schedule property as the decree scheduled property and the decree holder has no manner of right to do so. Accordingly, it was prayed for to hold that the plaint 'A' schedule items of properties or its part could not be allowed to be possessed from the claim petitioner in execution of the decree and it was prayed further that petition 'B' schedule item was not liable to be possessed by the decree holder.

6. The decree holder filed objection to the claim petition. It has been contended *inter-alia* that the decree schedule property is not the property of the claim

petitioner. The specific contention raised by the decree holder while opposing the claim petition was that the decree schedule property alone was sought to be possessed by the decree holder and not any other items of properties. The intention behind this claim petition was to delay the delivery of the property, sale deed of which was already executed by the execution court, much earlier. It was specifically contended that the wife of the claim petitioner filed O.S.No.363/1995 after the decree in O.S.597/1991, contending that the decree schedule property was that of her and the said contention was negated by the trial court, appellate court as well as the High Court in Second Appeal. It was thereafter the present claim petition was filed with a view to delay the delivery of the property without any *bona fides*.

7. The Execution Court ventured the matter. Claim petitioner got examined as PW1. Exts.A1 to A2 were

marked. Ext.B1 was marked on the side of decree holder. Exts. C1, C1(a), C2 & C2(a) were also marked.

8. Finally, the Execution court dismissed the claim petition after meticulously analysing the claim of the petitioner. It was found by the execution court that even though the claim petitioner claimed title and possession over the petition 'A' schedule items of properties to an extent of 6.81 acres, during cross of examination, PW1, the claim petitioner, admitted that he had sold 78 cents of property to his daughter out of 6.81 acres of property shown as 'A' schedule. Further, it was observed by the trial court that during cross examination, the claim petitioner (PW1) admitted that he had sold 5.5 acres of property out of plaint 'A' schedule to one Stalin. But the said vital aspect not disclosed in the claim petition. Accordingly, the trial court found that the possibility of the claimant to have right and

title in respect of 'A' schedule is only 53 cents excluding 78 cents + 5.5 acres scheduled, out of the total extent of 6.81 acres. In this context, it is relevant to note that 'B' schedule property in the claim petition is the same property that is scheduled in OS No.597/91 (the present suit). Further after passing decree in O.S.No.597/91, a suit as OS No.363/1995, was filed by the wife of the claim petitioner contending that the decree schedule property in O.S.No.597/1991 is her own property. On analysis of evidence, OS No.363/1995 was dismissed holding that the right claimed by the wife of the claim petitioner in respect of B schedule could not be found on evidence. It is relevant to note that challenging the said finding, First Appeal preferred and was dismissed. Although matter taken by way of Second Appeal before this Court, the same also was dismissed. It was thereafter, the decree in O.S.No.597/1991 reached the stage of execution of the sale deed by the court and now what remains is delivery of the

said property to the decree holder.

9. Thus it is perceivable that after the dismissal of O.S.No.363/1995, filed by the wife of the claim petitioner, claiming right over the decree schedule property, during execution stage, the husband of the plaintiff in OS No. 363/1995 raised contention in this claim petition that he is the owner in possession of 'A' schedule items having an extent of 6.81 acres and the decree schedule is part of his property. In this context, it has to be observed that during cross examination of PW1, he admitted that the earlier O.S.No.363/95 filed by his wife was conducted by him and he is aware of dismissal of this case.

10. In this matter, as things stand now, it is emphatically clear that the claim petitioner filed this petition after suppressing material facts in the matter of the extent of property he is having title and possession as on the date of

filing of the petition, in a case, where he had sold all properties except 53 cents out of 6.81 acres at the time of filing the claim petition.

11. In this matter, initially, a commission was appointed at the instance of the claim petitioner and he had filed Exts.C1 report and C1(a) plan. As per C1 series, the commissioner categorically stated that the petition 'A' schedule properties could not be identified because none of the parties, including the claim petitioner, produced any documents to assist the commissioner and surveyor to identify the property. However, the claim petitioner filed a petition to remit the commission report so as to identify the petition A schedule property. In consequence thereof, C1 series were remitted to the Commissioner and C2 series (C2 and C2(a)) were filed before the trial court. As per Ext.C2 series, the Commissioner reported that decree

schedule item No. 1 property could not be identified. But, he had identified item No.2 & 3 properties out of the decree schedule in re-survey sub-division 5/4 and 5/5. Accordingly, C2(a) plan was filed. So the plots identified as re-survey 5/4 & 5/5 are decree schedule item Nos.2 & 3 properties. It is reported by the Commissioner further that after the dismissal of the suit filed by the wife of the claim petitioner, in an Adalat conducted by the Re-survey Authority, the property is shown as the property of the wife of the claim petitioner, in the resurvey. This aspect would go to show that the property identified by the Commissioner in Ext.C2(a) plan is the decree schedule property and the same is not at all part of 6.81 acres of property, where the claimant asserts title. It is interesting to note that when the Commissioner visited the property for the 2nd time, the claim petitioner placed three documents to aid the Commissioner to identify plaint 'A' schedule items.

Those documents seen narrated in paragraph 2 of Ext.C2(a) as copies of OA 3103/1972, the photocopy of possession certificate dated 09.11.2005 and photocopy of tax receipt dated 08.11.2005. On the side of the decree holder, document No.2219/1993 also was produced. So the documents supplied by the claim petitioner to identify the properties also were considered by the Commissioner and it was reported in paragraph 3 of the report that plaint 'A' schedule items could not be identified relying on the documents including the possession certificate placed by the claim petitioner or as per the lie and nature of the properties or as per survey documents or as per the documents at the village office. It is also reported that the extent of property in old survey covered by 'A' schedule is more and in Ext.C1 report, the Commissioner stated the same as property having an extent of 21.60 acres. It is reported by the Commissioner further that the decree

schedule properties available and identified are properties in re-survey 5/4 and 5/5. It is to be noted that when C2 series were filed before the Execution Court, the claim petitioner filed petition to remit the same. In fact, remittance was sought for the second time, after filing two reports, without aiding the Commissioner to locate either 6.81 acres of property or 53 cents of property, for which alone the claim petitioner can claim title. Challenging the same, OP(Civil) No.2827/2010 was filed before this Court and this Court, as per judgment dated 12.10.2012 passed the following order.

“A detailed analysis of the evidence on record at this interlocutory stage would be impermissible in proceedings under Article 227 of the Constitution of India. I direct the court of the Principal Munsiff of Palghat to dispose of the claim petition (EA No.253/2005) within a period of two months from the date of receipt of a copy of this judgment. The court below shall on the basis of the available evidence deal with the claim petition at the earliest. The sufficiency or otherwise of the reports and plans submitted by the Advocate Commissioner shall be considered by the execution court during the final disposal.”

12. Going by the direction issued by this Court, the same is to dispose of the claim petition within a period of two months, with liberty to the Execution Court to consider the sufficiency of the reports and plans during the final disposal of the claim petition. The trial court meticulously analyzed the available materials and observed in paragraph No.22 of the order as under:

“The said survey commission was remitted. Accordingly, Ext. C2 report and Ext.C2(a) plan were produced. The commissioner had been directed to identify the petition schedule properties in E.P. 236/2004. As per the report item Nos. 2 and 3 of the decree schedule properties were identified by the commissioner as per the resurvey records. Item No.1 could not be identified. Documents had been produced from both sides. The commissioner also reported that the A schedule properties in E.A. 253/2005 could not be identified either according to the documents produced from the claim petitioner or according to the lie of the property or according to the village records. In the said survey division a larger extent of property was there at place. So, therefore he could not be identify where the A schedule properties as per the Pattayam in O.A. No.3103/1972 lay. He also stated that item No.1 in B schedule property could not be identified but item No.2 and 3 were identified. There had been separate sub-divisions done for the same in F.M.B. The sub-divisions were respectively 5/5 and 5/4. In resurvey number 5/5 the extent was 35 cents and in resurvey 5/4 the extent was 17

cents. Ext.C2(a) as the plan produced by him regarding the same. ”

13. Accordingly, the Execution Court is of the view that the claim petitioner did not give sufficient details to identify the properties and, therefore, the claim petitioner is at fault. Further, it was observed by the Execution Court that the claim petitioner wanted the Commissioner to identify the boundaries of the property of the claim petitioner as per his choice.

14. When the matter was taken in appeal, the learned appellate judge also concurred the finding. Both courts concurrently found that Ext.C2 series are sufficient to dispose of the claim petition in a case where the claim petitioner miserably failed to identify petition A schedule properties, through his right in respect of the property can possibly be to an extent of 53 cents, if the same is physically available as against the claim of 6.81 acres and the said assertion is an absolute suppression of material facts with a view to protract the execution proceedings. It is crucial to note that the claim

petitioner not produced the documents admittedly executed in favour of his daughter or in favour of Stanly, to ascertain any property remaining in his name after the said transfers. The Commission specifically pointed out that as per the possession certificate given by the claim petitioner also, property located as re-survey 5/4 & 5/5 is not covered.

15. To summarise, it has to be held that the claim petitioner's attempt is to delay the execution of the decree by playing dilatory tactics in a case, he is well aware of the fact that the decree schedule property is the property on which his wife asserted right and title and she miserably failed to establish the same and the same is not part of the property of the claim petitioner. In this context, the evidence of PW1 is very vital as I have already pointed out. As per the evidence given by PW1, he parted title and possession over the properties forming part of 6.81 acres and the possibility of the claim petitioner to have title and possession is only in respect of 53 cents. The documents pertaining to transfer of 78 cents of property in favour of his

daughter and 5.5 acres of property in the name of Stanly were not produced before the court. Any how, it has to be held that the present petition has been filed suppressing material facts deposed by PW1 and the intention behind the filing of this petition is only to delay the execution of the decree in a suit of the year 1991. It has to be observed further that the petitioner's attempt is to stall the delivery of the decree schedule property to the decree holder by creating confusion in the mind of the court regarding identity of the decree schedule property.

16. In this matter, as I have already pointed out, the first question raised by this Court is answered holding that the decree obtained by the decree holder in another suit for specific performance cannot affect the right of the appellant who holds the property with an independent title, provided, he could plead and establish his independent title with certainty. In answer to the 2nd question, it is held that the decree passed in OS No.597/1991 is not binding on the appellant and therefore the independent right claimed by the appellant, if any, can be found

on evidence. At the same time, when the claim petitioner, who has given evidence as PW1 admitted that he himself had conducted the suit for and on behalf of his wife, if the subject matter in both the suits happened to be one and the same and his wife happened to be the plaintiff in OS No.363/1995, the same is a very vital point to evaluate the case of the claim petitioner with utmost care and caution since fake claim as part of lethargic attitude could be foreseen.

17. In answer to the third question, Is the order passed by the court below touching the Commission Report against the direction in the judgment in OP(C) No.2827/2011 of this Court, it has to be observed that this Court directed in OP(C).No.2827/2010 that, a detailed analysis of the evidence on record at this interlocutory stage would be impermissible in proceedings under Article 227 of the Constitution of India. I direct the court of the Principal Munsiff of Palghat to dispose of the claim petition (EA No.253/2005) within a period of two months from the date of receipt of a copy of this judgment. The

court below shall on the basis of the available evidence deal with the claim petition at the earliest. The sufficiency or otherwise of the reports and plans submitted by the Advocate Commissioner shall be considered by the execution court during the final disposal.

18. Therefore, the execution court obeyed the order of this Court and disposed of the claim petition and also found that the reports and plan submitted by the Advocate Commissioner, particularly, Ext.C2 series, which identified the decree schedule property, not form part of the petition schedule property, where the petitioner, in fact, did not have title or possession as of now in its entirety, though he could claim 53 cents alone as his own and, therefore, the trial court as well as the appellate court did not do anything against the direction of the judgment of this Court in O.P(c).No.2827/2010.

19. In view of the matter, the concurrent verdicts entered into by the Trial Court and appellate court did not

require any interference. Thus it has to be held that the decree obtained by the decree holder will in no way affect the right of the claim petitioner as per Ext.A1 purchase certificate and the independent claim after failure of OS No.363/1995 at the instance of his wife also was in now way established the right by identifying the properties properly or showing that 'B' schedule is part and parcel of 'A' schedule in any manner.

20. It is found by the execution court as well as the appellate court, that the commission reports available are sufficient to decide the claim petition and the said finding is found to be in order. Question No.3 is also answered in the negative. In the result, the appeal fails and is dismissed.

All the pending interlocutory applications in this Second Appeal shall also stand dismissed.

Sd/-

A. BADHARUDEEN
JUDGE

Nsd