

Sunny Vs. Rajan

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Court : Kerala

Decided On : Jan-30-2013

Judge : Honourable Mr.Justice K.M.Joseph

Appellant : Sunny

Respondent : Rajan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.M.JOSEPH & THE HON'BLE MR. JUSTICE K.RAMAKRISHNAN WEDNESDAY, THE 30TH DAY OF JANUARY 2013 10TH MAGHA 193 Ex.FA.No. 8 of 2013 ----- [AGAINST THE ORDER DTD. 31/10/2012 IN E.A. 19/2012 IN E.P. 44/2011 IN O.S. NO.103/2010 OF THE SUB COURT, NEDUMANGAD] APPELLANTS/PETITIONERS:

----- 1. SUNNY, S/O. BHARGHAVAN, THIRUVONATHIL, NELLANADU MURI, VENJARAMOODU, NEDUMANAGAD TALUK, THIRUVANANTHAPURAM.

2. SONY, S/O. BHARGHAVAN, THIRUVONATHIL, NELLANADU MURI, VENJARAMOODU, NEDUMANGAD TALUK, THIRUVANANTHAPURAM. BY ADV. SRI.SAJU.S.A. RESPONDENTS/RESPONDENTS:

----- 1. RAJAN, S/O. SREEDHARAN, ANIL BHAVAN, KAVUVILA, POTHENCODE P.O., ANDOORKKONAM VILLAGE, THIRUVANANTHAPURAM, PIN-695 584.

2. BHARGHAVAN, S/O. RAGHAVAN, PADMASREE, AALIYADU P.O, KOLIACODE VILLAGE, THIRUVANANTHAPURAM, PIN-695 607. R1 BY ADVS. SRI.AUM MANGALASSERRY, SRI.M.R.RAJESH. THIS EXECUTION FIRST APPEAL HAVING COME UP FOR ADMISSION ON 30-01-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: Prv. K. M. JOSEPH & K. RAMAKRISHNAN, JJ.

----- EX. F. A. NO. 8 OF 2013.----- Dated this the 30th January, 2013 JUDGMENT K.M. Joseph, J Appellants calls in question the order purported to be passed on a petition filed by the appellants under Order 21 Rule 97 CPC. The case of the appellants, in brief, is as follows: The appellants are the petitioners in E.A.No.19/2012 in E.P.No.44/2011 in O.S.No.103/2010 on the file of the Court of the Subordinate Judge, Nedumangad. The respondents are the respondents in the EA. The first respondent is the judgment creditor/deGREE holder and the 2nd respondent is the judgment debtor in E.P. EA.No.19/2012 was a petition filed by the appellants under Order XXI Rule 97 CPC. In order to prove the appellants' case, PW1 was examined and marked Ext4s.A1 to A4. On the side of the respondents, DW1 was examined. The Execution Court, after evaluation of the evidence on record, EX.F.A.NO.8/2013 2 dismissed the EA. Hence this Appeal.

2. The court below found that in cross-examination the first appellant has admitted that the property scheduled in the application is the E schedule stated in the compromise and the father had agreed to settle that property in favour of Manju, the sister of the appellants who is the daughter of the 2nd respondent. It is further noted that in cross-examination PW1 has admitted that he and his brother (2nd appellant) have no right over the property. He would state that the sister Manju is aged 31 years and thus it can be seen that if at all any application can be filed that should have been filed by the said Manju and not the appellants. The learned Judge found force in the contention of the decree holder that the application is a collusive one between the appellants and the second respondent (judgment debtor) and the application was found to be not maintainable.

3. We heard the learned counsel for the appellants and also the learned counsel for the caveator. EX.F.A.NO.8/201

4. Learned counsel for the appellants would contend that under the compromise, the appellants are in possession. We asked the learned counsel for the appellants as to under colour of what right the appellants claim title and possession in terms of the compromise. We are unable to elicit any answer. Learned counsel for the caveator would dispute the contention that the appellants are in possession. As found by the court below, the right if at all is in favour of Manju. Manju is not a party before us. Manju is aged 31. The application is not filed on behalf of Manju also. We also notice that this is a case where there has not been any sale and the attempt of the appellants appears to be to avert the execution sale. We asked the appellants how the application under Order XXI Rule 97 is maintainable without there being a decree for recovery of possession as admittedly this is a money suit. The appellants would then contend that it can be treated as an application under Order XXI Rule 58. As rightly pointed out, under Order XXI Rule 58, the appellants had failed to establish any manner of right. In EX.F.A.NO.8/2013 4 such circumstances, we agree with the court below and find no merit in the Appeal and the Appeal will stand dismissed. Sd/= K. M. JOSEPH JUDGE Sd/= K. RAMAKRISHNAN JUDGE kbk. //True Copy//

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