

Baiju vs Jayan

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Court : Kerala

Decided On : Mar-02-2023

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : Mat.Appeal/316/2018

Appellant : BAIJU

Respondent : JAYAN

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR THURSDAY, THE 2ND DAY OF MARCH 2023 / 11TH PHALGUNA, 1944 MAT.APPEAL NO. 316 OF 2018 (I.A.NO.671 OF 2016 IN O.P.NO.1207 OF 2014 IN THE FAMILY COURT, ATTINGAL DATED 10.08.2017) APPELLANTS/RESPONDENTS: 1 BAIJU S/O.VIJAYAN, AGED 38 YEARS, COOLIE, CHENNAVILA, KAYIKKARA DESOM,KADAKKAVOOR VILLAGE 2 ANAND AGED 40,AGRICULTURE,S/O. BALAKRISHNAN, RESIDING AT ANANDAM VEEDU,FROM KADAVILAKATHU VEEDU, PLAVEDU,VAMANAPURAM DESOM, PULIMATH VILLAGE BY ADV. SRI.R.ANILKUMAR RESPONDENTS/RESPONDENTS:

1 JAYAN AGED 46, S/O. NARAYANA PILLAI, RESIDING AT MEENAKUNNATHU VEEDU, PLAVEDU, VAMANAPURAM DESOM, PULIMATH VILLAGE, PIN 695 612 2 SANTHA W/O. SASIKUMAR, RESIDING AT SARASWATHI VILASOM, KARAMKODE, CHIRAKKARA, ULIYANADU DESOM, CHATHANOOR P.O, KOLLAM DISTRICT 691 572 3 SARANYA AGED 26, D/O. SANTHA, SARASWATHI VILASOM, KARAMKODE,

CHIRAKKARA, ULIYANADU DESOM, CHATHAMNNOOR P.O, KOLLAM DISTRICT 691 572 4 SARMYA AGED 22, D/O. SANTHA, SARASWATHI VILASOM, KARAMKODE, CHIRAKKARA, ULIYANADU DESOM, CHATHAMNNOOR P.O, KOLLAM DISTRICT 691 572 BY ADVS. SRI.J.JAYAKUMAR SRI.S.SANTHOSH KUMAR SMT.ANJANA.S.SANTHOSH THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 02.03.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

Anil K.Narendran, J.

The appellants filed O.P.No.1207 of 2014 before the

Family Court, Attingal, seeking a decree to set aside the exparte decree passed by the Family Court, Kollam in O.S.No.369 of 2001 and also the execution proceedings in E.P. No.79 of 2008 in O.S. No.369 of 2001, pending before the Family Court, Nedumangad. The 2nd respondent herein along with her children, namely respondents 3 and 4 herein, filed O.S. No. 369 of 2001 before the Family Court, Kollam, on 11.06.2001, against her husband-Sasikumar for return of gold

ornaments and seeking maintenance. In that suit the petitioner schedule property in O.P. No.1207 of 2014 was attached on 05.11.2001. Sasikumar executed a document with respect to the said property in favour of the 2 nd appellant, who is his nephew, and thereafter, the 2 nd appellant executed another document in respect of the said property, in favour of the 1st appellant, on 03.05.2002.

Respondents 2 to 4 filed E.P. No.79 of 2008 before the Family

Court, Nedumangad for executing the decree in O.S. No.369 of 2001. The property was sold in auction in the execution proceedings, which was purchased by respondents 2 to 4 vide Sale Certificate issued by the Court. Later vide Sale Deed No.184 of 2003, respondents 2 to 4 sold that property in favour of Baiju, the 1st appellant herein.

2. In O.P. No.1207 of 2014, the 1 st respondent herein

filed I.A. No.671 of 2016 to dismiss that Original Petition as not maintainable, since the relief sought for is to set aside the ex parte decree of the Family Court, Kollam in O.S. No.369 of 2001 and also the execution proceedings in E.P. No.79 of 2008 pending before the Family Court, Nedumangad. The appellants, who are the petitioners in O.P. No.1207 of 2014 and respondents 1 and 2 in I.A. No.671 of 2016 opposed that interlocutory application, though they did not choose to file a written objection.

3. Before the Family Court the appellants herein contended that respondents 2 to 4 have obtained an ex parte decree in O.S. No.369 of 2001, by suppressing true facts. At

the time of filing of that Original Suit and passing the order of attachment of the property, Sasikumar did not have any right in that property, as he had sold the same to the 2 nd appellant. Respondents 2 to 4 fraudulently obtained the decree in O.S. No.369 of 2001 without making the real owner of the property a party to that proceedings. In the execution petition, Sasikumar did not appear or contest. The appellants have filed O.S. No.44 of 2013 against respondents 3 to 5 for a decree of prohibitory injunction. In that suit, they appeared before the Munsiffs Court, Attingal and produced documents and only then the appellants came to know about the ex parte decree in O.S. No. 369 of 2001 and the execution proceedings before the Family Court, Nedumangad. Therefore, they filed O.P. No.1207 of 2014 to set aside the ex parte decree of the Family Court, Kollam in O.S. No.369 of 2001, which was obtained by respondents 2 to 4 fraudulently and for a declaration that execution proceedings before the Family Court,

Nedumangad in E.P. No.79 of 2008 are not sustainable and also to set aside the document No. 184/2003 executed by

respondents 2 and 4 in favour of the 1st respondent, finding that it is ab-initio void.

4. Respondents 2 to 4 contended that the appellants

are not bonafide purchasers of the property. Sasikumar executed a bogus document in favour of the 2 nd appellant who is only a name lender and he did not effect mutation of the property in his name. At the time of filing of O.S. No.369 of 2001, respondents 2 to 4 have no knowledge about that document. Eventhough the 1st appellant claims that he purchased property from the 2nd appellant in the year 2002, he did not effect mutation of the property in his name and he has not paid tax. If he had taken encumbrance certificate he could have got information that the property was attached in O.S. No.369 of 2001 of the Family Court, Kollam. When the 2nd respondent filed an application for effecting mutation before the Tahsildar, Chirayinkeezhu, the 1 st appellant filed

objection opposing mutation of property in her name. Therefore, the 1st appellant could not contend that he was unaware of the Sale Certificate executed by the Family Court, Nedumangad in E.P. No.79 of 2008. The 1st appellant contended that he is a bonafide purchaser of the property and he had purchased the property after verifying all the documents and he had effected mutation of the property in his name which, in the above circumstances, can only be incorrect.

5. By the order dated 10.08.2017 the Family Court

allowed I.A. No. 671 of 2016 holding that the original petition, i.e., O.P.No.1207 of 2014 is not maintainable. The reasoning of the Family Court, as contained in paragraphs 7 and 8 of the

order reads thus;

7. The 1st prayer in the OP is to set aside the exparte decree passed by the Family Court, Kollam in O.S.No. 369 of 2001, under Order 21 Rule 106 CPC. Order 21 Rule 106 CPC deals with setting aside orders passed in executing

proceedings (Sub rule 2 and 3 of Rule 105 of

Order 21 CPC)That Rule has nothing to do with setting

aside exparte decree. It is the case of the petitioners that in E.P.No.79 of 2008 before the Family Court, Nedumangadu, notice was issued to Sasikumar only and he was exparte. So, the execution proceedings

before that court is not sustainable. Admitting the property was sold in auction, in E.P.No.79 of 2008 before the Family Court, Nedumangadu and R2 to R4 got the property as per the Sale Certificate issued from that Court. Thereafter, they sold the property to the 1 st respondent. The petitioners have not filed any petition in the Execution proceedings before that Court. In Unnikrishnan and Others V. Kunhibeevi and Others (2011 (1) KHC 352) it was held that the right to file a suit under Order 21 Rule 103, which was available earlier had been taken away by the Amendment Act of

1976. Any person who claims any right, title or interest, whether or he is a party to the decree has to pursue his remedies only under the relevant rule applicable under

Order 21 CPC in execution proceedings. Any decisions

thereof is deemed to be a decree, which may be appealed as provided by the Code, and it has to be treated as final and conclusive Procedures prescribed in Rule 97 to 103 is a complete Code in itself. Fresh suit challenging the Court Sale, held not maintainable. The words 'any person' covered by order 21 Rule 97 CPC includes persons, other than judgment debtor or those who claim derivative title from the judgment debtor.

Even the third party setting forth any right over the property covered by the Court Sale can have any recourse to Rule 97 or 99 of Order 21 CPC and not by way of a

separate suit. In the light of the dictum laid down in the above stated decision, it can be seen that the OP is not maintainable.

8. It is also contended by the respondents that the OP is

not maintainable before this court, since this court has no jurisdiction to entertain and deal with the OP. Section 7 of the Family Court Act deals with the jurisdiction of the Family Courts. As per section 7 of the Act, the Family Court shall have jurisdiction to deal with the suits or other proceedings of the nature referred to in the Explanations. Explanations (a) to (g) deals with Suits and Proceedings mentioned in Section 7 (a) of the Act. On going through Explanations (a) to (g) of Section 7 of the Family Court Act, it can be seen that this Court has no Jurisdiction to entertain and deal with the OP. It is an admitted fact that the petitioners have filed a suit against the respondents 2 to 4 before the Munsiff's Court, Attingal and it is pending. For the above reasons, I find that the OP is not maintainable and hence the OP is to be dismissed.

6. Feeling aggrieved, the appellants are before this

Court in this appeal, invoking the provisions under Section 19(1) of the Family Courts Act, 1984. This appeal is filed along with C.M. Application No.1 of 2018 (C.M. Application No.940 of 2018) to condone the delay of 71 days, which was condoned by the order dated 28.06.2022.

7. Heard the learned counsel for the petitioner and also the learned counsel for respondents 2, 3 and 4. Despite service of notice, none appears for the 1st respondent.

8. The appellant in O.P No.1207 of 2014 sought to set aside the decree of the Family Court, Kollam in O.S. No.369 of 2001 and further to annul the execution proceedings in

E.P.No.79 of 2008 on the file of the Family Court, Nedumangad. O.S No.369 of 2001 was filed by respondents No.2 to 4 against Sri.Sasikumar. The reliefs sought

were recovery of gold ornaments given to the 2nd respondent at the time of her marriage and also maintenance. Sri.Sasikumar remained ex parte and when a decree was passed, respondent Nos. 2 to 4 filed E.P.No.79 of 2008 before the Family Court, Nedumangad. Indisputably, the property was attached and it was later sold in public auction. Respondents, No. 2 to 4, who are the decree-holders purchased the property in auction. They in turn sold the property to the 1st respondent. After that, the appellants have filed O.P. No. 1207 of 2014.

9. The essential contentions of the 1st respondent in

I.A.No.No.671 of 2016 are two fold; the first is that the Family Court does not have jurisdiction to entertain O.P.No.1207 of 2014, and second is that the proceedings in E.P.No.79 of 2008 cannot be called in question in such an independent

proceedings. The said contentions were supported by respondent Nos.2 to 4. Both contentions were answered by the Family Court against the appellants. The appellants would contend that the Family Court rendered the said finding without adverting to the real facts. The learned counsel appearing for the appellants would submit that the appellants were not parties to either O.S.No.369 of 2001 or E.P.No.79 of 2008, and therefore they have every right to challenge the

said proceedings by filing a separate petition. It is contended that the decree in O.S.No.369 of 2001 is vitiated by fraud. Similarly the proceedings in E.P.No.79 of 2008, were also vitiated by fraud inasmuch as the appellants were not given notice of the same and at the time of attachment Sri.Sasikumar did not have title to or interest in the property in question.

10. In K.A.Abdul Jaleel v. T.A.Shahida [AIR 2003

SC 2525] the Apex Court considered the scope and ambit of the jurisdiction of the Family Court. It was held that it is now a well-settled principle of law that the jurisdiction of a court created specially for resolution of disputes of certain kinds should be construed liberally and if restricted meaning is ascribed to Explanations appended to Section 7 of the Family Courts Act, that would frustrate the object wherefore the Family Courts were set up.

11. Therefore, as far as possible, jurisdiction of the Family Court has to be inferred. It has to be considered, however, whether the dispute involved has a proximate connection with the marital relationship. What is relevant is not the identity of the parties, but the nature of dispute involved.

12. Since O.P.No.1207 of 2014 is not between parties

to a marriage or their representatives the question is whether it comes within the purview of explanation (d) to Section 7(1) of the Family Courts Act. That provision came up for consideration before this Court in *Mini and others v. Sivaraman and another* [2020 (5) KHC 629]. The dispute there was regarding a suit for mandatory and prohibitory injunction. The suit was filed by the father-in-law and mother-in-law. Husband was no more. Wife along with her children allegedly trespassed into the residential building in the property of the father-in-law, the 1st plaintiff. The jurisdiction of the Family Court to entertain such a suit was in question. This Court observed, after referring to various decisions on the point, that the parameters for deciding the jurisdiction in the light of Explanation (d) to Section 7(1) are,-

13. With the broad propositions of law laid down in the

above case, it is necessary to answer the following questions in our quest to identify the forum for adjudicating the lis under consideration. (1) Is there a suit or a proceeding? (2) Is the relief sought for in the suit or proceeding one for an injunction or order? (3) Has the suit or proceeding stemmed from circumstances arising out of a marital relationship? If the answer to the above questions are all in the affirmative, then the Family Court alone has the jurisdiction.

13. The pertinent question is whether the issue stems

up from the circumstances arising out of the marriage. O.S.No.369 of 2001 was certainly relating to a matrimonial dispute. That suit was decreed and the decree was satisfied. In the execution of the decree, property belonging to the judgement-debtor-husband was sold. With that and upon recording of the satisfaction of the decree, nothing pertaining to the matrimonial dispute involved in O.S.No.369 of

2001 remained.

14. The challenge of the appellants in O.P.No.1207 of 2014 is about legality of the decree in O.S. No.369 of 2001. Reason for assailing the said decree is that it is vitiated by

fraud. Such a relief is one available in common law and one which does not come within the purview of Section 7(1) of the Family Courts Act. The Family Court, Attingal rightly had answered the said question against the appellants. We do not find any reason to upset the said findings that the Family Court did not have jurisdiction to entertain O.P.No.1207 of 2014.

15. The reasons urged by the appellants to set aside the proceedings in E.P.No.79 of 2008 are that at the time of

ordering attachment of the property in question, Sri.Sasikumar did not have title to the property. The further contention is that respondent Nos. 2 to 4, the decree holders, despite having knowledge that the property was already alienated and the 2nd appellant mutated the property in his name, did not bother to give notice to the appellants in the

execution proceedings and therefore the execution proceedings and the sale are illegal.

16. O.S.No.369 of 2001 was filed on 11.06.2001. The property in question was attached in that suit on 05.11.2001.

It appears that Sri.Sasikumar alienated the said property in favour of the 2nd appellant before the date of that attachment. The 2nd appellant conveyed the said property to the 1st

appellant on 03.05.2002, which is after the date of attachment. It was much after that the property was brought on sale in E.P.No.79 of 2008 and respondent Nos.2 to 4 purchased the same in public auction. Even assuming that the 1st appellant took the property on sale from Sri.Sasikumar prior to the date of attachment, once the sale in execution of the decree in O.S.No.369 of 2001 has taken place and the

purchase certificate issued to the purchasers, provisions of

Order XXI Rule 97 to 103 get attracted.

17. In Unnikrishnan v. Kunhibeevi [2011 (1) KLT

508]:2011(1) KHC 352], this Court, held that a third party has to move an application before the court in which the decree is executed to resist or obstruct its execution and his dispossession, and he can do so even before delivery is ordered or after dispossessed from the property, and that he cannot maintain a separate suit to establish his right, interest

and title over the property, if it is so covered by the decree put in execution.

18. In Noorduiddin v. Dr. K.L Anand [(1995) 1 SCC

242], the Apex Court, held that any person who claims any right, title or interest, whether or not he is a party to the decree, his remedy is to pursue his case under the relevant rule applicable under Order XXI of the Code for adjudication of his right, title and interest in the immovable property in execution and any decision thereof, which is deemed to be a decree, subject to the further challenge as provided by the Code, has to be treated as final and conclusive. The Apex Court in the above decision has held thus:

Thus the scheme of the Code clearly adumbrates that when an application has been made under

Order 21, Rule 97, the court is enjoined to

adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit."

19. In Sreenath and another v. Rajesh and others,

[(1998) 4 SCC 543] the Apex Court held that after the amendment to the Code in 1976 one has not to go for a fresh suit but all matters pertaining to that property including any obstruction by a stranger are adjudicated in execution proceedings. The expression 'any person' in Rule 97(1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order XXI Rule 97 of the Code.

20. In view of the law laid down in the aforesaid

decisions, the appellants are not entitled to file a separate suit or petition in order to call in question the execution proceedings in E.P.No.79 of 2008, particularly the delivery proceedings. Accordingly, we are of the view that the Family Court correctly dismissed I.A.No. 671 of 2016 and held that O.P. No.1207 of 2014 is not maintainable inasmuch as the appellants' challenge is against the decree in O.S.No.369 of

2001 and the proceedings in E.P. No.79 of 2018 in O.S. No.369 of 2001. There is no reason to interfere with the said

order and consequent dismissal of O.P.No. 1207 of 2014.

The appeal fails and it is dismissed. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE PV

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