

Shaijan vs Varghese

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Court : Kerala

Decided On : Mar-22-2023

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

Appeal No. : RP/881/2022

Appellant : Shaijan

Respondent : Varghese

Judgement :

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR WEDNESDAY, THE 22ND DAY OF MARCH 2023 / 1ST CHAITHRA, 1945 REVIEW PETITION NO. 881 OF 2022 AGAINST THE JUDGMENT DATED 31.05.2022 IN EX.F.A.NO.20 OF 2014 OF THE HIGH COURT OF KERALA REVIEW PETITIONER/APPELLANT/PETITIONER/THIRD PARTY: SHAIJAN AGED 53 YEARS, S/O. THOTTATHIL PARAMBIL KUTTAN, ALATHUR VILLAGE DESOM, ALATHUR P.O,

MUKUNDAPURAM TALUK, THRISSUR DISTRICT - 680741. BY ADV
G.SREEKUMAR (CHELUR)
RESPONDENTS/RESPONDENTS/RESPONDENTS/PARTIES TO THE
SUIT:

1 VARGHESE AGED 65, S/O. OUSEPH, RESIDING IN THE ADDRESS
KANNAMPUZHA HOUSE, CHEMBANNURKARA, ANGAMALY
VILLAGE, ALUVA TALUK, ANGAMALY P.O, ERNAKULAM DISTRICT -
680308. 2 YOHANNAN STEPHEN AGED 60 YEARS, S/O. OUSEPH,
RESIDING IN THE ADDRESS PAINADATH HOUSE,
CHEMBANNURKARA, ANGAMALY P.O, ERNAKULAM DISTRICT -
680308. 3 DILEEP, AGED 52 YEARS, S/O, CHETTIPARAMBIL
KUMARAN, ALATHUR VILLAGE DESOM, ALATHUR P.O,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT - 680741. BY ADV
RAPHEL SRI K.S.BHARATHAN THIS REVIEW PETITION HAVING
COME UP FOR FINAL HEARING ON 07.03.2023, THE COURT ON
22.03.2023 DELIVERED THE FOLLOWING: C.R.

ORDER

P.G. Ajithkumar, J.

The appeal was dismissed as per the judgment dated 31.05.2022. The appellant filed this Review Petition under Section 114 and Rule 1 of Order XLVII of the Code of Civil Procedure, 1908. He seeks to review the judgment and hear the appeal afresh.

2. There was a delay of 28 days in filing the Review Petition. As per the order dated 06.12.2022 in C.M.Appl.No.1 of 2022 delay was condoned.

3. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondents.

4. The petitioner seeks a review of judgement dated

31.05.2022 by contending that there occurred errors essentially on three aspects, namely,- i) The finding that there was statutory charge created as per the provisions of Section 55(6)(b) of the Transfer of Property Act, 1882 (T.P.Act) on the property in question was incorrect inasmuch as the said finding militates against the last paragraph of Section 54 of the T.P.Act, which says that a contract for sale by itself does not create any interest or charge on such property; ii) The award dated 29.01.2010, in execution of which the property was sold in auction, was not registered. But that aspect was lost sight of the Court; and iii) The finding that the sale in favour of the petitioner comes within the mischief of Section 53 of the T.P.Act is wrong and illegal inasmuch as the procedural requirements of Section 53 were not satisfied.

5. The learned counsel appearing for the petitioner

would submit that the last paragraph of Section 54 of the T.P.Act categorically says that a contract for sale does not create charge in a property, and hence Section 55(6)(b) cannot be interpreted to mean that as soon as a contract for sale was entered into, the charge is created. In the view of the learned counsel, Section 55(6)(b) of the T.P.Act envisages a situation where the purchaser after executing a sale deed does not get possession of the property, and if, in such a case, the purchaser did not decline to accept delivery of the property in an improper

way, he shall have a charge over the property as against the seller and all persons claiming under him and not a situation prior to execution of the sale deed.

6. Clause (b) of Section 55(6) of the T.P.Act reads,-

"(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the sellers interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific

performance of the contract or to obtain a decree for its rescission.

7. Section 55(6) of T.P.Act deals with rights of a buyer.

On the first flush it may appear that the rights referred to therein are of a buyer in a completed transaction of sale. But a careful reading of clause (b) of Section 55(6) would show otherwise. Once sale is complete there is no concept of earnest money, specific performance of the contract or rescission of the contract.

When clause (b) of Section 55(6) contemplates remedy

concerning those elements, it is incorrect to say that this clause has application only in cases where sale has already taken place. Charge as per clause (b) of Section 55(6) is created to the extent of the sellers interest in the property. In the post sale scenario, the seller ordinarily can have no interest in the property, and if the contention advanced by the learned counsel for the petitioner is accepted, this provision can deal with a contingency of non- delivery of property after execution of a sale deed alone. The remedy of the buyer in such a situation is not specific performance, but to sue for getting delivery of possession. Section 22 of the Specific Relief Act, 1963, which enables the court to order specific performance of a contract for the transfer of immovable property, does not recognize a suit for mere possession. In that view of the matter also the said contention of the petitioner is untenable.

8. As held by a Division Bench of this Court in

Kumaran v. Kumaran and others [2011 (1) KLT 252] the mere existence of a contract for sale or even a decree for specific performance on the basis of the agreement does not,

in any manner, affect the title of the vendor who has entered into the contract for sale. By that the vendee does not acquire title to the property. But the right created by provisions of Section 55(6)(b) of the T.P.Act is a charge on the property, as against the seller and persons claiming under him, to the extent of the seller's interest in the property in a case where the buyer has improperly declined to accept delivery of the property for the amount of any purchase-money he has

properly paid and, when he properly declines to accept the delivery, for the earnest money. It is not title to the property, but a charge to realise the money so paid alone. The meaning that would convey on a harmonious construction of both those provisions is that Section 55(6)(b) stand as an exception to the last paragraph of the provisions of Section 54 of the T.P. Act. Any other interpretation will make Section 55(6)

(b) of the T.P. Act otiose. In that view of the matter under

clause (b) of Section 55(6) of the T.P. Act, a statutory charge is created in favour of the buyer in a contract for sale. In such a case the court when passing a decree only recognizes and not creates the charge anew. In the judgement dated 31.05.2022 that aspect was stated precisely.

9. As rightly pointed out by the learned counsel

appearing for the respondents what the last paragraph of Section 54 of the T.P. Act means is that a mere entering into a contract without there having anything further, such as payment of part or full of the purchase money, earnest money, delivery of property and so on and so forth, there cannot be a charge on the property as contemplated in clause

(b) of Section 55(6) of the T.P. Act. If there occurred any of such things also in addition to creation of a contract for sale, a charge would be created, subject to other conditions in clause

(b) of Section 55(6) of the T.P. Act. The contention of the petitioner that there occurred an error in rendering the finding in that regard in the judgement dated 31.05.2022 is therefore rejected.

10. The learned counsel appearing for the petitioner would submit that the award dated 29.01.2010, which was put in execution, was not a registered one as required in

Section 17(1)(e) of the Registration Act, 1908 and therefore the execution was invalid. For that reason, the attachment ordered in E.P.No.205 of 2010 would not

sustain in law, and therefore the finding in the judgement to the contrary is an error.

11. Section 17(1)(e) of the Registration Act reads,-

17. Documents of which registration is compulsory.-(l) xx xx (e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order

published in the Official Gazette, exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees. Section 17(1)(e) deals with non-testamentary instruments transferring or assigning a decree or order of a court or an award. If such a decree, order or award purports to operate to create, declare, assign, limit or extinguish any right or interest in an immovable property, the same shall be registered, provided the value is more than one hundred rupees. A charge is an interest in the immovable property. The said provision does not envisage the registration of a decree or

order or an award, which creates charge in an immovable

property. It only contemplates registration of transfer inter- vivos or assignment of such a decree, order of award. Here, there is no transfer or assignment of the award dated 29.01.2010. Therefore, Section 17(1)(e) of the Registration Act has no application in this case and the contention of the petitioner is rejected.

12. Section 53 of the T.P.Act says that transfer of an

immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of the creditors. The provisions of Section 53 enables such a creditor to bring a suit and if such a suit is filed it shall be on behalf of, or for the benefit of all the creditors. Citing the said provisions, the learned counsel appearing for the petitioner

would contend that the objection raised by the 1st respondent based on Section 53 of the T.P.Act should not have been given a seal of approval by this Court. The said finding in the

judgment dated 31.05.2022 is also therefore said to be an
error.

13. In Verizon Builders and Developers Limited

and another v. Jyothi Susan John and others [2019 (1) KLT 100] a Full Bench of this Court held that when a claim is made in respect of a property by a third party claimant stating that the property attached has been assigned in his favour, even prior to the date of attachment, necessarily, the plaintiff/respondent gets an opportunity to file an objection and contend that the transfer was fraudulent. Therefore, while considering the claim, it is quite inconceivable to observe that the objection to the claim petition regarding fraudulent transfer under Section 53 of the TP Act is not liable to be considered. That position of law answers the said contention of the petitioner. The 1st respondent could well raise a defence based on the provisions of Section 53 of the T.P.Act, to the

claim of the petitioner. As such, the third contention raised by the petitioner is also untenable.

14. In Meera Bhanja v. Nirmala Kumari Choudhury

[(1995) 1 SCC 170] the Apex Court held that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 of the Code.

15. In *Parsion Devi v. Sumitri Devi* [(1997) 8 SCC 715] the Apex Court, in the context of the power of review under

Order XLVII, Rule 1 of the Code held that, a judgment may be

open to review inter alia if there is a mistake or an error apparent on the face of the record. An error that is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1 of the Code. In the exercise of the jurisdiction under Order XLVII, Rule 1 of the Code, it is not permissible for an erroneous decision to be reheard and corrected. A review petition has a limited purpose and cannot be allowed to be an appeal in disguise.

16. In *Lily Thomas v. Union of India* [(2000) 6

SCC 224] the Apex Court reiterated that, the power of review can be exercised for correction of a mistake but not to substitute a view. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review.

17. In *Anantha Reddy N. v. Anshu Kathuria*

[(2013) 15 SCC 534] the Apex Court held that, the review jurisdiction is extremely limited and unless there is mistake apparent on the face of the record, the order/judgment does not call for a review. The mistake apparent on record means that the mistake is self-evident, needs no search and stares at its face. Surely, review jurisdiction is not an appeal in disguise. The review does not permit the rehearing of the matter on merits.

18. The Apex Court in *S.Madhusudhan Reddy v. V.Narayana Reddy and others* [2022 SCC OnLine SC 1034 : 2022 (5) KLT SN 18] it was held as follows:- 26. As can be seen from the above exposition of

law, it has been consistently held by this Court in several judicial pronouncements that the Courts jurisdiction of review, is not the same as

that of an appeal. A judgment can be open to review if there is a mistake or an error apparent on the face of the record, but an error that has to be detected by a process of reasoning, cannot be described as an error apparent on the face of the record for the

Court to exercise its powers of review under Order

XLVII Rule 1 CPC. In the guise of exercising powers of review, the Court can correct a mistake but not substitute the view taken earlier merely because there is a possibility of taking two views in a matter. A judgment may also be open to review when any new or important matter of evidence has emerged after passing of the judgment, subject to the condition that such evidence was not within the knowledge of the party seeking review or could not be produced by it when the order was made despite undertaking an exercise of due diligence. There is a clear distinction between an erroneous decision as against an error apparent on the face of the record. An erroneous decision can be corrected by the Superior Court, however, an error apparent on the face of the record can only be corrected by exercising review jurisdiction.

19. From the proposition of law laid down in the aforesaid decisions, it is clear that one cannot apply for review by asking the court to substitute a view taken in the

judgement saying that another view is also possible. The

review cannot be an appeal in disguise. An error which is apparent on the face of record alone can be a ground for review. None of the grounds urged by the petitioner herein

establishes that there is an apparent error in the judgement

dated 31.05.2022. In such circumstances, we are of the view that the review petition lacks merits and the same is dismissed. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr

