

Saiju vs Murali

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Court : Kerala

Decided On : Jan-03-2023

Judge : Honourable Mr.Justice C.S.Dias

Appeal No. : OP(C)/1715/2022

Appellant : SAIJU

Respondent : Murali

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE C.S.DIAS TUESDAY, THE 3RD DAY OF JANUARY 2023 / 13TH POUSHA, 1944 OP(C) NO. 1715 OF 2022 AGAINST THE JUDGMENT DATED 08.04.2022 IN CMA 20/2022 OF THE SUB COURT,ATTINGAL PETITIONER/RESPONDENT IN CMA NO.20/2022/PETITIONER IN I.A.NO.1/2022 IN O.S.NO.145/2022 SAIJU , AGED 53 YEARS, S/O.BALAKRISHNAN, RESIDING AT: KAVYA BHAVAN, DARSANAVATTOM, NAGARoor VILLAGE, THIRUVANANTHAPURAM DISTRICT, PIN - 695102 BY ADV V.PHILIP MATHEWS RESPONDENTS/ APPELLANTS IN CMA NO.20/2022/ RESPONDENTS IN I.A.NO.1/2022 IN O.S.NO.145/2022:

1 MURALI S/O.SIVADASAN, RESIDING AT: MIDHUN NIVAS, ELAMBA VILLAGE, THIRUVANANTHAPURAM DISTRICT, PIN - 695103 2 ARATHI, AGED 23 YEARS, D/O.MURALI, RESIDING AT: MIDHUN NIVAS, ELAMBA VILLAGE, THIRUVANANTHAPURAM DISTRICT, PIN - 695103 3 DEEPA, AGED 48 YEARS, W/O.MURALI, RESIDING AT:MIDHUN NIVAS, ELAMBA VILLAGE, THIRUVANANTHAPURAM DISTRICT, PIN - 695103 4 RAVEENDRAN S/O.SREEDHARAN, RESIDING AT: AKSHARA, ELAMBA VILLAGE, THIRUVANANTHAPURAM DISTRICT, PIN - 695103 BY ADV SASTHAMANGALAM S. AJITHKUMAR S THIS OP (CIVIL) HAVING COME UP FOR ADMISSION ON

21.12.2022, THE COURT ON 03.01.2023 DELIVERED THE FOLLOWING: -:2:- Dated this the 3rd day of January, 2023

JUDGMENT

Aggrieved and displeased with Ext.P7 judgment

passed in C.M.A.No.20/2022 by the Court of the Subordinate Judge, Attingal (Appellate Court), the respondent in the appeal has filed the original petition. The respondents 1 to 3 in the original petition were the appellants before the court below.

2. The relevant facts leading to Ext.P7 judgment

are:

(i) The petitioner had filed O.S.No.145/2022 before

the Court of the Munsiff, Attingal (Trial Court), against the respondents 1 to 3 for a decree of permanent prohibitory injunction to restrain them from committing any breach of the agreement entered into between the parties for and from carrying out quarrying operations in the plaint schedule properties. -:3:-

(ii) The petitioners case in Ext.P.1 plaint is that the

respondents 1 and 3 are husband and wife, and the second respondent is their daughter. The respondents 1 and 3 are the owners of the plaint item No.1 property and the second respondent is the owner of plaint item No.2 property. Item Nos.1 and 2 properties have granite deposits and are lying contiguously.

(iii) The respondents 1 to 3 were interested in

quarry operations in their properties but had no road access. Accordingly, they entered into Ext.P2 agreement with the petitioner, permitting him to conduct quarry operations in their properties.

(iv) Even though Ext.P2 agreement is styled as an

agreement, it has the characteristic of a licence. As per Ext.P2, it was the petitioners responsibility to obtain the requisite permissions/clearances from the statutory authorities before carrying out the quarrying operations. It was also, inter alia, agreed that the respondents 1 to 3 would bear the -:4:- construction cost for the road access to their properties from the public road. The respondents 1 to 3 agreed to give the petitioner 45% of the total profit. The tenure of the agreement was ten years.

(v) Pursuant to Ext.P2 agreement, the petitioner

spent substantial amounts. With the consent of respondents 1 to 3, the petitioner entered into Ext.P.3 agreement with the fourth respondent to construct a road through his property to have road access to the plaint schedule properties. The respondents 1 to 3 had agreed to adjust the construction costs towards the consideration of Ext.P2 agreement.

(vi) After fulfilling his part of the obligations in

Ext.P2 agreement, the petitioner approached the respondents 1 to 3 for their consent for obtaining the statutory clearances/permissions, but they bluntly refused. The petitioner has learnt that the respondents 1 to 3 were attempting to give their consent to third parties in blatant violation of

Ext.P2 agreement. Hence, -:5:-

the petitioner was constrained to file the suit.

(vii) Along with the plaint, the petitioner filed

I.A.No.1/2022 (Ext.P4) for an order of temporary injunction to restrain the respondents 1 to 3 from committing any breach of the agreement and carrying out quarrying operation in the plaint schedule properties. The respondents 1 to 3 opposed the application through Ext.P5 written objection. (viii)The Trial Court, by Ext.P6 order, restrained the respondents 1 to 3 from committing any breach of the agreement.

(ix) Aggrieved by Ext.P6 order, the respondents 1 to 3 filed C.M.A.No.20/2022. The Appellate Court, by the impugned Ext.P7 judgment, reversed Ext.P6 order.

(x) Ext.P7 judgment is patently wrong, unjustifiable and incorrect. Hence, the original petition.

3. The second respondent has filed a counter -:6:-

affidavit, on behalf of herself and the respondents 1 and 3, denying the allegations in the original petition. It is her case that Ext.P2 lease deed was executed between the petitioner and the respondents 2 and 3. She had signed the agreement on behalf of the first respondent on the strength of a power of attorney executed by the first respondent - her father. Ext.P2 is an unregistered document. The power of attorney does not authorise her to enter an agreement in the nature of Ext.P.2. The Trial Court passed Ext.P6 order of injunction without considering the facts of the case and the law on the point. Section 107 of the Transfer of Property Act, 1882, prohibits the lease of the property by way of an unregistered document for a term

exceeding one year. Section 17(1) (d) of the Registration Act, 1908, mandates that a lease of immovable property exceeding one year requires registration. Similarly, Section 49 of the same Act lays -:7:- down that an unregistered document is inadmissible in

evidence. The petitioner has not made out a prima facie case. In Ext.P3 agreement executed between the petitioner and the fourth respondent, the petitioner has admitted that Ext P2 is a lease deed and not a deed of licence. Ext P2 is unsupported by consideration. There is no consensus ad idem between the parties. Hence, the original petition is to be dismissed.

4. During the course of the hearing of the

original petition, the second respondent produced Ext R2(a), along with I.A.No.1/2022, to substantiate that the first respondent has revoked the power of attorney executed by him in favour of the second respondent.

5. Heard; Sri. V. Philip Mathew, the learned Counsel appearing for the petitioner and Sri. Sasthamangalam Ajith Kumar, the learned Counsel appearing for the respondents 1 to 3.

6. Sri. Philip Mathew zealously argued that the -:8:-

Appellate Court has exceeded its powers of authority by reversing Ext.P6 order by the impugned Ext.P7 judgment. The Appellate Court has transgressed its limits of jurisdiction. Neither has the Appellate Court

formulated any questions/points before rendering Ext.P7 judgment nor was the petitioner given an opportunity to advance the arguments on the findings rendered in Ext.P7 judgment. The Appellate Court has pre-judged the suit in an application for an order of temporary injunction, which has rendered the suit otiose. The finding that the first respondent had not authorised the second respondent to execute any deed like Ext.P2 agreement is absurd and is an issue to be decided in the suit. Furthermore, the Appellate Court has rendered an unwarranted finding that item Nos.1 and 2 properties are not demarcated; therefore, Ext.P2 is unenforceable, which is a matter to be considered in the suit and is not germane for considering Ext.P4

-:9:-

application for temporary injunction. He placed emphasis on the decisions of this Court in Fareeda v. Rajan Babu [1992 KHC 26] and Ignatious v. Dominic [2017 (3) KHC 836] and the decision of the Honble Supreme Court in Minu Kumari and Anr. v. State of Bihar and Ors. [2006(2) KLT 288] and Sukhpal Singh v. Jaswinder Kaur and Ors. [2017 KHC 2731] to buttress his contentions.

7. Sri. Ajith Kumar countered the above

submission by defending Ext.P7 judgment. He contended that as long as the first respondent has not authorised/empowered the second respondent to give the property on lease, Ext.P2 agreement in respect of item No.1 property is void and goes to the roots of the matter. Therefore, Ext.P2 agreement is unenforceable in law. Likewise, as the properties are lying contiguous and not demarcated in Ext.P2 agreement, excavation cannot be permitted. The Appellate Court was justified

:-10:-

in vacating Ext.P6 order. He relied on the decision of the Honble Supreme Court in Skyline Education Institute (India) Private Ltd. v. S.L. Vaswani and Anr. [2010 KHC 4009] and a decision of this Court in George Chandi and Ors. v. Beena and Ors. [2018 KHC 5252], to fortify his contentions. He urged that the original petition be dismissed.

8. The question is whether there is any illegality in Ext.P7 judgment.

9. The petitioner has filed the suit against the respondents 1 to 3 for a decree of permanent

prohibitory injunction, to restrain them from committing any breach of the Ext.P2 agreement and from carrying any quarrying operations in the plaint schedule properties.

10. It is admitted that the respondents 1 to 3 entered into Ext.P2 agreement on 01.06.2022, whereby the respondents 1 to 3 permitted the petitioner to :-11:- carry out quarrying operations in item Nos. 1 and 2 properties.

11. Subsequently, the petitioner also entered into Ext.P3 agreement with the fourth respondent to construct a road to have access to plaint schedule properties.

12. The petitioners grievance is that the respondents 1 to 3 have refused to fulfill their part of the contract and are attempting to give consent to third parties, that too after the petitioner has performed his part of the contract.

13. Along with the suit, the petitioner filed Ext.P4 application to pass an order of temporary injunction. The application was opposed by respondents 1 to 3 through Ext.P5 written objection.

14. The Trial Court, after considering the rival pleadings and materials on record, particularly that the respondents 1 to 3 have admitted the execution of :-12:-

Ext.P2 agreement, held that the petitioner had made out a prima facie and the balance of convenience rests in his favour and, therefore, the petitioner was entitled to an order of temporary injunction.

15. The Appellate Court, by the impugned Ext.P7

judgment, reversed Ext.P6 order mainly on the finding that the first respondent had not authorised the second respondent to enter into an agreement in the nature of Ext.P2 and that item Nos.1 and 2 properties were not demarcated and, therefore, quarrying cannot be conducted. In addition to the above findings, the Appellate Court also held that Ext.P2 is unenforceable and the petitioner is not likely to succeed in the suit.

16. The sheet anchor of the respondents 1 to 3 in

Ext.P5 written objection to Ext.P4 application is that the Trial Court lacks inherent jurisdiction because the dispute between the parties is a commercial dispute falling within the purview of the Commercial Courts :-13:-

Act, 2015 (in short, Act), that that the first respondent had not authorised the second respondent to enter into an agreement in the nature of Ext.P2; therefore, the agreement is bad in the eyes of law and that the petitioner had falsely proclaimed to the respondents 1 to 3 that he had entered into an agreement with

Adani Group for supplying materials for the Vizhinjam Port construction.

17. The respondents 1 to 3 have no case in Ext.P5 objection that Ext.P2 agreement is unenforceable or that quarrying cannot be carried out because item Nos.1 and 2 properties are not demarcated.

18. Nevertheless, the Appellate Court has delved

into the findings beyond the pleadings in Ext.P5 written objection and held that Ext.P2 is unenforceable and the petitioner has little chance of succeeding in the suit. The above finding, in my opinion, is patently erroneous and unwarranted. The Appellate Court has -:14:- exceeded its powers of authority, warranting the invocation of the power of superintendence of this Court under Article 227 of the Constitution of India.

19. The Appellate Court ought to have confined

itself to Ext.P4 application and Ext.P5 written objection and ascertained whether Ext.P6 order was justiciable or not, instead of transgressing into areas which are neither party's case.

20. Now, before this Court, the second

respondent has advanced a new defence that, by Ext.R2 (a), the first respondent has revoked the power of attorney executed in her favour. The validity of Ext.R2(a) is a matter to be examined by the court below; otherwise, it may prejudice to the parties while deciding the suit.

21. In the light of the finding rendered above, the elaborate arguments advanced by both sides, the precedents relied on and Ext.R2 (a) deed of revocation, -:15:-

I am of the definite view that the matter is to be reconsidered afresh by the Appellate Court, after affording both sides an opportunity of being heard, failing which it will cause prejudice to the petitioner, especially by prejudging the suit in an application for an order of temporary injunction, that too without

examining the validity of Ext.P2 agreement or considering the scope and purport of the relationship between a principal and an agent under the Indian Contract Act. 1872. Nonetheless, I refrain from going deeper into the merits of the matter, being conscious that the matter is being remitted back to the Appellate Court.

Resultantly, I allow the original petition as follows:

(i) Ext.P7 judgment is set aside.

(ii) The petitioner and the respondents are directed to appear before the Appellate Court on 09.01.2023. -:16:-

(iii) The Appellate Court is directed to reconsider

Ext.P4 application afresh after adverting to Ext.P5 written objection and after affording the parties a fresh opportunity to advance their respective arguments and to produce additional materials, if any.

(iv) The Appellate Court is directed to reconsider

Ext P4 application, untrammelled by any observation in this judgment, in accordance with law and as expeditiously as possible, at any rate, within a period of two months from the date of receipt of a certified copy of this

judgment.

Sd/- C.S.DIAS,JUDGE DST/28.12.22 //True copy/ P.A.To Judge -:17:- APPENDIX
PETITIONER EXHIBITS EXHIBIT P 1 COPY OF PLAINT IN O.S.NO.145/2022
ON THE FILE OF MUNSIFF COURT, ATTINGAL

EXHIBIT P 2

COPY OF AGREEMENT/ LICENSE DATED 01-06-2021

RESPONDENT EXHIBIT P 4 COPY OF I.A.NO.1/2022 FILED BY THE
PETITIONER IN O.S.NO.145/2022 EXHIBIT P 5 COPY OF OBJECTION FILED
BY RESPONDENTS 1 TO 3 IN I.A.NO.1/2022 EXHIBIT P 6 COPY OF ORDER
DATED 08-04-2022 PASSED BY THE MUNSIFF COURT, ATTINGAL IN
I.A.NO.1/2022 IN O.S.NO.145/2022 EXHIBIT P 7 COPY OF JUDGMENT DATED

27-07-2022 PASSED BY THE SUB COURT, ATTINGAL IN C.M.A.NO.20/2022
RESPONDENT EXHIBITS EXHIBIT R2(A) THE TRUE COPY OF DEED OF
REVOCATION OF POWER OF ATTORNEY EXECUTED 1ST RESPONDENT
DATED 4/5/2022 EXHIBIT R2(B) THE TRUE COPY OF THE BANK STATEMENT
OF THE 3RD RESPONDENT EXHIBIT R2(C) THE TRUE COPY OF THE BILLS
OF THE TRANSACTION MADE BY THE 2ND RESPONDENT AND HER
HUSBAND

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