

Rajesh vs Narayanan Nair

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SooperKanoon Citation : sooperkanoon.com/1440568

Court : Kerala

Decided On : Jun-21-2022

Judge : Honourable Mrs. Justice M.R.Anitha

Appeal No. : RP/405/2022

Appellant : Rajesh

Respondent : Narayanan Nair

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA TUESDAY, THE 21ST DAY OF JUNE 2022 / 31ST JYASHTA, 1944 RP NO. 401 OF 2022 AGAINST THE JUDGMENT DATED 17.11.2021 IN RSA 809/2013 OF HIGH COURT OF KERALA REVIEW PETITIONERS/APPELLANTS 2 TO 4:

1 RAJESH AGED 49 YEARS S/O. RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 2 MEERA AGED 51 YEARS D/O. RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 3 THARA AGED 46 YEARS D/O. RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY

KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 BY ADV AJITH VISWANATHAN

RESPONDENTS/ADDITIONAL RESPONDENTS 2 & 3: 1 LATHA RAJU AGED 52 YEARS D/O. RAJAPPAN NAIR, PERINCERY PUTHEN VEEDU, KODANADU P.O, KURICHELAKODE, PIN CODE 683544 2 SANAL KUMAR AGED 42 YEARS S/O. PERINCERIL PUTHEN VEEDU, VALLIYOORKAVU, MANANTHAVADY, WAYANAD, PIN CODE 670 645 ADV.V.RAJENDRAN THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 31.05.2022, ALONG WITH RP.405/2022, THE COURT ON 21.06.2022 DELIVERED THE FOLLOWING: & in R.S.A.No.810 of 2013 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA TUESDAY, THE 21ST DAY OF JUNE 2022 / 31ST JYASHTA, 1944 RP NO. 405 OF 2022 AGAINST THE JUDGMENT IN RSA 810/2013 OF HIGH COURT OF KERALA REVIEW PETITIONERS:

1 RAJESH AGED 49 YEARS S/O.LATE RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 2 MEERA AGED 51 YEARS D/O. LATE RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 3 THARA AGED 46 YEARS D/O. LATE RAVINDRAN NAIR, KARIPPURATH HOUSE, ELAMBAKAPPILLY KARA, VENGOOR WEST VILLAGE, PIN CODE 683575 BY ADV AJITH VISWANATHAN

RESPONDENTS: 1 NARAYANAN NAIR AGED 78 YEARS NEPHEW OF NARAYANAN NAIR, PERINCERRY MADATHIL PUTHEN HOUSE, KURICHILAKODEKARA, KODANAD VILLAGE,PIN CODE 683575 2 LATHA RAJU AGED 52 YEARS D/O. LATE RAJAPPANNAIR, PERINCERY PUTHEN VEEDU, KODANADU P.O, KURICHELAKODE, PIN CODE 683544 & in R.S.A.No.810 of 2013 3 3 SANAL KUMAR AGED 42 YEARS S/O. LATE

RAJAPPAN NAIR, PERINCHERIL PUTHEN VEEDU, VALLIYOORKAVU, MANANTHAVADY, WAYANAD, PIN CODE 670 645 ADV.V.RAJENDRAN THIS REVIEW PETITION HAVING COME UP FOR ADMISSION ON 31.05.2022, ALONG WITH RP.401/2022, THE COURT ON 21.06.2022 DELIVERED THE FOLLOWING: & in R.S.A.No.810 of 2013 4 M.R.ANITHA, J ***** & in R.S.A.No.810 of 2013 ----- Dated this the 21st day of June, 2022

ORDER

Review petitions have been filed against the common

judgment in R.S.A.Nos.809/2013 and 810/2013 dated

17.11.2021. Those Regular Second Appeals were directed against the common judgment and decree dated 15.02.2013 in A.S.No.180/2007 and 181/2007 of the Sub Court, Perumbavoor which arose from the common judgment and decree dated 10.10.2002 in O.S.No.44/1997 and 112/1997 of the Munsiff's Court, Perumbavoor.

2. Appellants 2 to 4 in R.S.A.No.809/2013 filed R.P.No.401/2022. First appellant in R.S.A.No.809/2013 expired & in R.S.A.No.810 of 2013 5 pending the R.S.A. and the review petitioners are his legal heirs.

3. Additional appellants 2 to 4 in R.S.A.No.810/2013 filed Review Petition No.405/2022.

4. O.S.No.44/1997 has been filed for a permanent prohibitory injunction for restraining the defendants from trespassing into the plaint schedule property and for damages.

Originally the plaint schedule property was part of property held

by the family of the defendants. Plaintiffs purchased the plaint schedule property as per Exts.A2 and B4 sale deeds executed by the brother of the defendant, Narayanan Nair who is no more and his legal heirs are additional respondents 2

and 3. It is alleged in the plaint that from 1964 onwards the whereabouts of the defendant was not known to anybody and everybody was under the belief that he is no more. On that belief on the presumption available under Section 108 of the Indian Evidence Act, his brother Narayanan Nair sold the property to the plaintiffs on receiving valid consideration. In 1995, defendant reappeared and raised claim over the property. Thereupon the plaintiffs filed & in R.S.A.No.810 of 2013 6 O.S.No.518/1995 before the Munsiff's Court, Perumbavoor and that was ultimately compromised in a 'Neethimela'. Thereafter, in violation of the settlement, defendant trespassed upon the plaint schedule property and committed waste and hence the suit was filed.

5. Defendant filed written statement contending that

plaintiffs have no right or possession over the 93 cents of property scheduled in the plaint. It is also contended that, as per the Partition Deed No.1277/1957, 'A' schedule in the Partition Deed was allotted to the share of the defendant and his brother Narayanan Nair and another brother Chellappan Nair and mother Gouriamma. The brother Chellappan Nair died intestate as a bachelor and mother also died intestate. Hence the entire property was devolved upon the defendant and Narayanan Nair. The defendant was staying at Mananthavady for sometime and he occasionally used to come to the scheduled property. Narayanan Nair executed two documents with respect to 31 cents each in favour of 2nd plaintiff and a neighbour Ramakrishnan in & in R.S.A.No.810 of 2013 7 the year 1974 and another document in the name of plaintiffs in the year 1991. It is further contended that, when he came to know about the above Sale Deeds, he demanded partition. But Narayanan Nair refused to partition the property. The sale deeds are results of fraud and collusion practiced between Narayanan Nair and the first plaintiff.

6. He also filed O.S.No.112/1997 against the father of the above appellants and the brother Narayanan Nair seeking for cancellation of Ext.A2 Sale Deed and recovery of possession and consequential reliefs.

7. All the contentions in the written statement filed in

O.S.No.44/1997 have been reiterated and it is also contended that the Sale Deed alleged to have been executed as the result of fraud and collusion practiced between the defendants and is void ab initio.

8. Defendants filed written statement contending that the

Sale Deed executed by the second defendant is valid and supported by consideration and other allegations raised in the & in R.S.A.No.810 of 2013 8 plaint in O.S.No.44/1997 are also reiterated.

9. Both suits were tried jointly taking O.S.No.112/1997

as leading case. On the side of the plaintiff, PW1 was examined and Exts.A1 and A2 were marked. On the side of defendants, DW1 was examined and Exts.D1 to D18 were marked. Commissioner's report was marked as Ext.C1 and C1(a). By a common judgment the trial court dismissed both suits. Aggrieved by the judgment in O.S.No.44/1997, A.S.No.180/2007 and against the judgment in O.S.No.112/1997, A.S.No.181/2007 were filed before the Subordinate Judge's Court, Perumbavoor. The appellate court dismissed A.S.No.180/2007 and allowed A.S.No.181/2007. Aggrieved by the judgment in A.S.No.180/2007, R.S.A.No.809/2013 and aggrieved by the

judgment in A.S.No.181/2007, R.S.A.No. 810/2013 have been

filed. Both appeals were heard together and by a common judgment, this Court dismissed both appeals. Hence the review petitioners seek for review of the judgment in R.S.A.No.809/2013 and 810/2013 for the various grounds stated in the review & in R.S.A.No.810 of 2013 9 petitions.

10. Heard both sides. Parties would be referred as per their status in O.S.No.112/1997.

11. Scope of power of review under Order 47 Rule 1 of the Code of Civil Procedure, 1908 (in short, Code) is no more res integra.

12. In Kamlesh Verma v. Mayawati and Others

(2013) 8 SCC 320, it was held as follows:

14. Review of the earlier order cannot be done unless the court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In paragraphs 17 to 19 it was held as follows: 17. In a review petition, it is not open to the Court to reappreciate the evidence and reach a different

conclusion, even if that is possible. Conclusion

arrived at on appreciation of evidence cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto. & in R.S.A.No.810 of 2013 10

18. Review is not rehearing of an original matter. The power of review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court.....

19. Review proceedings are not by way of an

appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 CPC. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same.....

13. In Lily Thomas V. Union of India : 2000 KHC 536

it has been held by the two Judge Bench of the Apex Court that mere possibility of two views on the subject is not a ground for review and error contemplated under Order XLVII Rule 1 must be such which is apparent on the face of record and not an error which has to be fished out and searched. In Smt.Meera Bhanga v. Smt.Nirmala Kumari Choudhary : (1995) 1 SCC 170 : AIR 1995 SC 455 : 1995 KHC 737 a two Judge Bench of Apex & in R.S.A.No.810 of 2013 11 Court held that review of 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 Code of Civil Procedure.

14. In Chandra Kanta v. Sheik Habib : 1975 (1) SCC

674 : AIR 1975 SC 1500 : 1975 KHC 905 it has been held

that a mere repetition through different counsel of old and overruled arguments, a second trip is eventually a covered ground or minor mistakes of inconsequential import are obviously insufficient in order to maintain an order of review of dismissal.

15. In M/s. Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, [AIR 1964 (SC 1372)], it was observed as follows:

11. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that & in R.S.A.No.810 of 2013 12 where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

16. Same view was taken in Parsion Devi and others v. Sumitri Devi and others : (1997) 8 SCCC 715 as under :

"9. Under Order 47 Rule 1 CPC 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 which 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 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be

an appeal in disguise.

From the above it can be deduced that a judgment is not open for review unless there is a mistake or error apparent on the face & in R.S.A.No.810 of 2013 13 of record. Review is also not an appeal in disguise whereby an erroneous decision is reheard and corrected and to be strictly confined to the scope and ambit of Order 47 Rule 1 of the Code.

17. The main argument projected by the learned counsel

for the review petitioners is with regard to the interpretation of Ext.A2 as a void document by this Court in the light of rulings of the Apex Court. According to him, even if it is assumed that a fraudulent misrepresentation would have occurred, it would only make the document voidable and hence the plaintiff in O.S.No.112/1997 ought to have been non-suited.

18. Learned counsel in this context brought to my

attention to paragraph 13 of the judgment of this Court in R.S.A.No.809 of 2013 wherein Prem Singh and Others v. Birbal and other : (2006) 5 SCC 353 has been quoted. According to him, while passing the judgment, this Court has went wrong in properly analysing the distinction made by the Apex Court regarding void and voidable document. The learned counsel also highlighted paragraph 21 of Prem Singh which & in R.S.A.No.810 of 2013 14 reads as follows: 21. In Nigawwa v Byrappa Shiddappa Hireknrabnar and Ors : AIR 1968 SC 956), this Court

held that the fraudulent misrepresentation as regards

character of a document is void but fraudulent misrepresentation as regards contents of a document is voidable stating: The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the

transaction is void, while in the case of the latter, it is merely voidable.

19. From the above, what could be gathered is that a

fraudulent misrepresentation as to the contents of the document is voidable whereas fraudulent misrepresentation as to the character of the document is void. In the impugned judgment, this Court found that Ext.A2 was executed by the second & in R.S.A.No.810 of 2013 15 defendant in O.S.No.112/1997 in favour of the 1 st defendant on 16.07.1991 stating that the plaintiff was dead. But, 2 nd defendant was not able to prove that plaintiff was not alive on the date of Ext.A2. Hence it was found that Ext.A2 is certainly void. So, the question is with regard to the correctness of the finding of this Court about the document as void. Legal position is well settled as per Ningawwa v. Byrappa Shiddappa Hireknrabar and Others :: 1968 KHC 638 : AIR 1968 SC 956 : 1968(2) SCR 797. In Paragraphs 4 and 5 of the said

judgment the question of deciding whether a transaction is void

or voidable in the context of a gift deed it has been held as follows:

4.It is well-established that a contract or other transaction induced or tainted by fraud is not void, but only voidable at the option of the party defrauded. Until it is avoided, the transaction is valid, so that third parties without notice of the fraud may in the meantime acquire rights and interests in the matter which they may enforce against the party defrauded.

& in R.S.A.No.810 of 2013 16

"The fact that the contract has been induced by fraud does not make the contract void or prevent the property from passing, but merely gives the party defrauded a right on discovering the fraud to elect whether he shall continue to treat the contract as binding or disaffirm the contract and resume the property. If it can be shown that the party defrauded has at

any time after knowledge of the fraud either by express words or by unequivocal acts affirmed the contract, his election is determined for ever. The party defrauded may keep the question open so long as he does nothing to affirm the contract. *Clough v. L. & N. W. Ry.* (1871).LR 7 Ex 26 at p.34.

5. The legal position will be different if there is a

fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the character of the document and fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in

& in R.S.A.No.810 of 2013 17

the case of the latter, it is merely voidable. In *Foster v. Mackinnon*(2), (1869) 4 C.P.704 the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the Court observed : "It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

This decision has been followed by the Indian courts: *Sanni Bibi v. Siddik Hossain*, AIR 1919 Cal.728, and *Brindaban v. Dhurba Charan*, AIR 1929 Cal.606. It is not

the contention of the appellant in the present case that there was any fraudulent misrepresentation as to & in R.S.A.No.810 of 2013 18

the character of the gift deed but Shiddappa fraudulently included in the gift deed plots 91 and 92 of Lingadahalli village without her knowledge. We are accordingly of the opinion that the transaction of gift was voidable and not void and the suit must be brought within the time prescribed under Art. 95 of the Limitation Act."

20. So, the distinction between fraudulent representation

as to the character of the document and fraudulent misrepresentation as to the contents thereof has been distinctively described and with respect to the former, that is, fraudulent representation as to the character of the document, it has been held that the transaction is void and in the case of fraudulent representation as to the contents, it is held as voidable.

21. Balvant N. Viswamitra And Ors v Yadav

Sadashiv Mule (D) Through LRs, and Others : (2004) 8 SCC 706 : AIR 2004 SC 4377 a three Judge Bench of the Apex Court dealt with meaning of void decree, illegal, incorrect or & in R.S.A.No.810 of 2013 19 irregular decree and it has been held that where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

22. In Kiran Singh And Others v. Chaman Paswan

And Others : AIR 1954 SC 340, it has been held that a decree passed by a court without jurisdiction is a nullity and its invalidity could be set up wherever and

whenever it is sought to be in force or relied upon, even at the stage of execution and even in collateral proceedings and a defect of jurisdiction strikes at the & in R.S.A.No.810 of 2013 20 very authority of the court to pass any decree and that cannot be cured even by consent of parties.

23. The basic question in this case is whether the

execution of Ext.A2 by the 2nd defendant in favour of the first defendant strikes the root of the matter in the very execution of the document. It has been found by the appellate court as well as this Court that the 2 nd defendant executed Ext.A2 in favour of the first defendant under the guise that the plaintiff is not alive and seeking the aid of presumption of death of plaintiff under Section 107 and 108 of the Indian Evidence Act, the 2 nd defendant executed the document in favour of the first defendant with respect to a property belonging to the plaintiff.

24. This Court, by quoting LIC of India v. Anuradha :

(2004) 3 SCR 629 has found that the question as to death of

the plaintiff did not raise in a Court, Tribunal or any other authority was called upon to decide the question as to whether the plaintiff is alive or dead. So, the presumption of civil death & in R.S.A.No.810 of 2013 21 by defendants 1 and 2 was held to be not applicable. So, the very execution of the document by the 2 nd defendant in favour of the 1st defendant with respect to the property of plaintiff seeking the aid of presumption that he is not alive goes to the root of the document since the plaintiff has been alive at the time of execution of Ext.A2. 2nd defendant has no right whatsoever to execute the document with respect to the property owned by the plaintiff. So, the execution of the document by the 2 nd defendant with respect to the property of plaintiff when he is alive is fundamentally wrong and it strikes at the root of the document with respect to the right of the 2 nd defendant in executing the document and hence the execution of Ext.A2 by the second defendant in favour of the 1 st defendant with respect to the property, over which he has no right whatsoever, no doubt, makes the document void since the representation of the second defendant in Ext.A2 that the plaintiff is dead is a fraudulent representation as to the character of the document itself and hence the

finding of this Court that Ext.A2 is a void document is & in R.S.A.No.810 of 2013 22 based on well settled principles of law and it has not suffered any error or illegality on the face of record as has been contended by the learned counsel for the review petitioner so as to exercise the limited jurisdiction of this Court by exercising the power of review.

25. The learned counsel also contended that the property

covered by Ext.A2 and the remaining property is having a total extent of 93 cents, there is no identification of 62 cents of property and there is no Commissioner's report or plan demarcating 62 cents of property covered by Ext.A2 and hence according to him, there is no executable decree. It is also contended that a survey commission ought to have been taken to identify the plaint schedule property of 62 cents covered by Ext.A2. On going through the impugned order, it appears that no such argument regarding the identity of the property has been raised at the time of hearing. Father of the review petitioners, along with another filed O.S.No.44/1997 seeking for damages & in R.S.A.No.810 of 2013 23 and consequential prohibitory injunction restraining the plaintiff in O.S.No.112/97 from interfering with his possession over the plaint schedule property having an extent of 93 cents. The plaint schedule property in O.S.No.112/97 is 62 cents. So, if at all the properties are lying contiguous, 62 cents can very well be demarcated at the time of execution of the decree by taking appropriate steps. So, the contention of the review petitioner regarding the identity of the property and executability of the decree etc. cannot be raised at this stage. Based on the above discussion, it can safely be concluded that the review petition is found to be devoid of any merit and hence dismissed. (sd/-) M.R.ANITHA, JUDGE jsr/21/06/2022 True Copy P.S to Judge