

Clement @ James Vs. Prakashan

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Court : Kerala

Decided On : Nov-19-2014

Judge : Honourable Mr.Justice K.Harilal

Appellant : Clement @ James

Respondent : Prakashan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE K.HARILAL WEDNESDAY, THE19H DAY OF NOVEMBER201428TH KARTHIKA, 1936 RP.No. 408 of 2014 () IN OP(C).1578/2013 ----- AGAINST THE

JUDGMENT

IN OP(C) 1578/2013 of HIGH COURT OF KERALA DATED2503-2014. REVIEW PETITIONER(S)/RESPONDENT: ----- CLEMENT @ JAMES, S/O.ANTHAPPAN, THAIPARAMBIL HOUSE, ELOOR KARA, ELOOR VILLAGE. BY ADV. SRI.SABU S.KALLARAMOOLA RESPONDENT(S)/PETITIONER: ----- PRAKASHAN, S/O. RAMAN, MANALY HOUSE, CHERAI KARA, PALLIPPURAM VILLAGE, KOCHI TALUK. BY SRI.SAJAN MANNALI THIS REVIEW PETITION HAVING BEEN FINALLY HEARD ON1911-2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING: K. HARILAL, J.

----- R.P. No.408 of 2014
----- Dated this the 19th day of November,
2014

ORDER

The review petitioner herein is the respondent in O.P.No.1578/2013 on the files of this Court filed challenging Ext.P12 order of the court below declining to proceed against the property attached before judgment on the ground that the property has already been assigned to third party while the suit was dismissed for default and before its restoration. The Original Petition was filed, inter alia, contending that the Original Suit stood dismissed on default for a period from 9/2/2010 to 14/7/2010 only and the suit was restored on the files on 16/7/2010. But, no transfer of plaint schedule property was effected R.P. No.408 of 2014 -:

2. :- during the said period and the transfer of property was effected after the said period i.e., after the restoration of the suit on the files. Ext.P8 encumbrance certificate, covering a period from 1/1/1998 to 25/7/2012, shows that there was no transfer in favour of the third party by name 'Nisha' during this period. Therefore, the transfer of property may be a day after 25/7/2012, after the attachment came into force again by the restoration of the Original Suit. It is also contended that where the suit was restored on the files, all the interlocutory orders would also stand revived and hence the transfer effected while attachment order was not in force could be ignored and proceeded against the property. To fortify the above argument, the learned counsel for the respondent cited the decision in Ulahannan Chacko v Mathai (1986 KL301 and Vareed Jacob v. Solaman (2001 (3) KLT128.

2. Per contra, the review petitioner contended R.P. No.408 of 2014 -:

3. :- that the property was sold when the suit stood dismissed. Therefore, there was no attachment at the time of transfer of the property in favour of the third party. But he could not produce any kind of documentary evidence to substantiate the said contention. In the absence of any material to prove the review petitioner's contention, this Court was inclined to believe Ext.P8 encumbrance certificate which shows that there was no transfer of property during the period where the suit stood dismissed. On the above premises, this Court arrived at a finding that

the alleged transfer in favour of the third party by name 'Nisha' was effected after the revival of the attachment order. It is also found that a transfer made when the attachment order was in force is not binding to the decree holder and he has right to proceed against the property in execution of the decree. Consequently, the order under challenge passed by the court below was set aside and the R.P. No.408 of 2014 -:

4. :- Original Petition was allowed.

3. In this review petition, the review petitioner contended that Ext.P8 encumbrance certificate produced by the respondent was a false one and the respondent has fraudulently obtained the judgment from this Court by suppressing the true and correct material facts. According to him, the actual date of transfer of the property in favour of Nisha was on 28/6/2010 i.e., during the period when the Original Petition stood dismissed. To substantiate the above contention, the petitioner has produced Annexures-A2 and A3 encumbrance certificates and Annexure-A4 certified copy of the sale deed in favour of Nisha along with this review petition. Another contention is that in the impugned order of the court below which is marked as Ext.P12 in the Original Petition, by a typographical error, the year of sale deed was shown as '2011' instead of '2010', which is clear from Annexure-A4 tile deed produced herewith. It is also R.P. No.408 of 2014 -:

5. :- contended that, by the restoration of the Original Suit, the attachment order would not get revived in view of Order 39 Rule 11A(2) of the Code of Civil Procedure. Thus, factually as well as legally the impugned order sought to be reviewed is suffering from error apparent on the face of the record and suppression of material facts.

4. The learned counsel for the review petitioner advanced arguments in support of the grounds raised in the review petition. According to him, the impugned order suffers from error apparent on the face of the record caused by Ext.P8 encumbrance certificate and typographical errors in Ext.P12 order passed by the court below under challenge in the Original Petition. The actual date of transfer of the property was on 28/6/2010 which is evidenced by Annexures-A2 to A4. Therefore, the decree is not liable to be executed against the property which was

transferred in favour of Nisha when there is no attachment. R.P. No.408 of 2014 -:

6. :- 5. Per contra the learned counsel for the respondent advanced arguments to justify the findings in the impugned order sought to be reviewed. According to him, even if the transfer was effected when the suit stood dismissed, the order of attachment shall be deemed to be continued in the absence of specific order withdrawing the attachment. Therefore, notwithstanding the dismissal of the suit, the earlier attachment order was continuing in operation, as such, without interruption and the attachment order was live on the admitted date of transfer also i.e., 28/6/2010.

6. I have given anxious consideration on the arguments made at the Bar. Apparently, I find that the impugned order sought to be reviewed suffers from an error apparent on the face of the records. In fact, the actual date of transfer of the property in favour of Nisha was on 28/6/2010, the day on which the suit stood dismissed. Ext.P8 encumbrance certificate for a period from 1/1/1998 to 25/7/2012 R.P. No.408 of 2014 -:

7. :- which does not show the transfer of property in favour of Nisha, was not a reliable one. Annexures-A2 to A4 show that the transfer of property effected on 28/6/2010 in favour of Nisha was omitted to be mentioned in Ext.P8 encumbrance certificate produced by the respondent herein. Similarly, as contended by the review petitioner in the impugned order of the court below which was marked as Ext.P12 in the O.P., by a typographical error, the year of sale deed was shown as '2011' instead of '2010' which is clear from Annexure-A4 title deed produced by the review petitioner. Consequently, I am inclined to recall the order sought to be challenged and cancelled the same and I do so. The argument advanced by the learned counsel for the respondent that notwithstanding the dismissal of the suit, the order of attachment shall be deemed to be continuing, in the absence of specific order withdrawing the attachment, is a matter which does not deserve to be considered in this review R.P. No.408 of 2014 -:

8. :- petition. The said question will be considered at the time of fresh hearing of the Original Petition. In the result, the impugned order dated 25/3/2014 in O.P.(c) No.1578/2013 will stand recalled and cancelled and the Original Petition would be

heard afresh separately. Sd/- (K. HARILAL, JUDGE) Nan/ //true copy// P.S. to Judge

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