

Joseph Vs. Marium Thomas

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Court : Kerala

Decided On : Feb-08-2006

Reported in : 2006(1)KLT894

Judge : R. Bhaskaran and; M. Sasidharan Nambiar, JJ.

Acts : Transfer of Property Act - Sections 52; Family Courts Act - Sections 7, 8 and 18(3); Registration Act - Sections 89; Code of Criminal Procedure (CrPC)

Appeal No. : Ex. F.A. No. 46 of 2005

Appellant : Joseph

Respondent : Marium Thomas

Advocate for Def. : K. Gopalakrishna Kurup, Adv.

Advocate for Pet/Ap. : K.V. Sohan and; Sreeja Sohan K., Advs.

Disposition : Appeal dismissed

Judgement :

R. Bhaskaran, J.

1. This appeal is filed by a third party claimant in E.P.2/2003 in O.S.226/1993 on the file of the Family Court, Kottayam at Ettumanoor. The first respondent in the appeal obtained a decree for maintenance against the second respondent and the

decree made it clear that the claim for maintenance will be a charge on the plaint schedule property. The suit was filed as early as on 8-12-1993 before the Munsiff Court, Ettumanoor claiming maintenance at the rate of Rs. 750/- per month. The suit was decreed on 20-12-1995 at the rate of Rs. 500/- per month from 1-1-1994 charging the plaint schedule property for the claim for maintenance. On the date of filing of the suit itself there was a petition for attachment before judgment and a conditional attachment was ordered. In the decree passed on 20-12-1995 the Munsiff Court granted a charge for the plaint claim over the plaint schedule property. On 29-2-1996 the second respondent sold the property in favour of the appellant showing a consideration of Rs. 1 lakh. Subsequently E.P.49/1997 was filed for realisation of the decree debt by the first respondent against the second respondent. On 26-11-1998 the petitioner filed E.A.85/98 claiming that the property is not liable to be sold as he is a bonafide purchaser for consideration and he was not bound by the decree. That application was dismissed on 9-4-1999 holding that the transfer in favour of the petitioner was subject to the decree against the second respondent. Challenging that order the petitioner filed CRP.1379/99 before this Court and that was dismissed by order dated 27-7-1999. It was held by this Court that the transfer in favour of the appellant was hit by principle of lis pendens. Subsequently the appellant filed E.R39/99 offering to deposit Rs. 25,000/-and get the property released from the liability under the decree. That petition was also dismissed by the Munsiff Court, Ettumanoor. Against that order petitioner filed CRP.2583/1999 which was also dismissed following the order in CRP.1379/99.

2. While the earlier E.P. was pending before the Munsiff Court a contention was raised that Family Court is established and only the Family Court has jurisdiction to execute the decree. Thereafter fresh E.P. was filed before the Family Court and the earlier E.P. was dismissed. Before the Family Court the appellant filed E.A.42/03 which was also dismissed by the order under challenge.

3. In this appeal the learned Counsel appearing for the appellant contended that the court below was not correct in following the decisions in the earlier CRPs as the proceedings which were the subject matter of the two revisions were proceedings without jurisdiction and therefore orders in the CRPs were also not

binding on the appellant. It is also argued that the very decree obtained by the first respondent against the second respondent is a collusive decree and the appellant was cheated by both the husband and wife. Thirdly it is contended that the suit itself is for past maintenance and the decree for future maintenance was not claimed for and the decree was inexecutable with respect to the claim for future maintenance. It is also argued that the interlocutory application in the earlier E.Ps have no legs to stand after the disposal of the E.P.

4. The learned Counsel for the respondent on the other hand argued that none of these contentions can be sustained since the transfer in favour of the appellant is hit by Section 52 of the Transfer of Property Act and even if he is a bona fide purchaser his transfer has to be subject to the decision in the suit and he is not entitled to ignore the decree obtained by the first respondent against the second respondent. It is also argued that the contention that the earlier proceedings were without jurisdiction is having no substance as the court had full jurisdiction to consider the petition for execution.

5. In view of the above contention, the points for consideration in this appeal are:

- 1) Whether the earlier proceedings were without jurisdiction and
- 2) Whether the decree obtained is a collusive decree and whether the decree was beyond the prayer made in the plaint?

Point No. 1:

6. The learned Counsel for the appellant mainly relied on the provisions in Section 8 of the Family Courts Act relating to exclusion of jurisdiction of the ordinary Civil Courts in respect of matters covered by explanation to Section 7 of the Act. According to the learned Counsel the Family Court was established in Kottayam District on 19-9-1998 and the E.P. which was pending before the Munsiff Court, Ettumanoor could not have been proceeded as after the establishment of the Family Court any order passed by the Munsiff Court, Ettumanoor was without jurisdiction. Therefore the order in revision challenging the orders in those applications are only to be ignored, contends the learned Counsel. The learned

Counsel relied on the decisions of this Court in *G.M. Nair v. Jagadamma* 1994 (1) KLT 207. In that case the learned Single Judge K.T. Thomas, J. as his Lordship then was held that after the establishment of Family Court, the Magistrate has no jurisdiction to execute an order passed under Chapter 9 of the Cr.P.C. In *Devaki v. Chandrika* 1997 (2) KLT 746 a Division Bench of this Court held that after the establishment of the Family Court a petition to set aside an *ex parte* decree passed by a civil court in matters within the jurisdiction of the Family Court has to be filed before the Family Court. The appellant had challenged the orders passed by the Munsiff Court in the earlier execution proceedings and he never challenged the jurisdiction of the Civil Court before this Court while arguing the CRPs. Therefore it is doubtful whether the appellant can now contend that those proceedings were without jurisdiction. But it is unnecessary to rest this decision on this basis. We find from Section 18 of the Family Court Act that the decree or order passed by a Family Court can be executed by the Family Court or ordinary Civil Court to which it is sent for execution. Sub-section 3 of Section 18 gives a clear indication to the fact that the jurisdiction of the Civil Court to execute a decree of a Family Court is not ousted. According to the learned Counsel for the appellant it is only if the Family Court sends decree for execution that the Civil Court will get jurisdiction. But it has to be remembered in this context that here the decree was passed by the Civil Court itself and there is no necessity to send it for execution to another court. Even in cases where a decree is passed by the Family Court if the Civil Court has got jurisdiction to execute the decree we find no reason to doubt the jurisdiction of the civil court to execute the decree passed by the Civil Court itself. Therefore the contention that the earlier proceedings were without jurisdiction and have only to be ignored is unsustainable. It is not a case where there is absolute want of jurisdiction as the Family Court itself recognises the jurisdiction of the Civil Court to execute the decree by the Family Court. There is one more reason to reject the argument of the learned Counsel for the appellant as explanation to Section 7 excludes the jurisdiction of the Civil Court only in certain matters which are relating to proceedings between the parties to a marriage. Of course it includes a suit or proceeding for maintenance but in this case the appellant is not a party to the marriage or is not claiming any maintenance. He is a total stranger and his claim for the property purchased from the husband cannot be brought in

Clause 'f' to explanation to Section 7 of the Family Courts Act. It is only in such cases that the jurisdiction of the Civil Court is ousted and in all other cases the Civil Courts continue to have jurisdiction. In that respect also the contention of the learned Counsel for the appellant that the civil court has no jurisdiction to execute the decree passed by the Civil Court is unsustainable. The decisions referred to by the learned Counsel for the appellant are therefore clearly distinguishable on the facts of the case and they are not applicable to the facts of the case. The learned Counsel for the appellant also contended that under Section 89 of the Registration Act as applicable in Kerala it is mandatory that any attachment of immovable property should be communicated to the Sub Registrar's Office and if the same was not done there was no proper attachment. We find no such contention raised before the execution court and it is not possible for us to examine this question in appeal for the first time.

Point No. 2

7. The learned Counsel for the appellant then contended that the decree obtained by the first respondent against the second respondent is a collusive decree and it was to defeat the interest of the appellant. He also contended that since that contention was not considered by the execution court the same may be directed to be considered by that court. We find that there was no such contention raised at any time in the earlier proceedings. Moreover the suit was filed as early as in 1993 and the appellant purchased the property only in 1996. It is too much to assume that the suit was filed anticipating sale of the property and to defeat the prospective purchaser. We perused the plaint in the suit and it is seen that the very allegation of the plaintiff in the suit is that the plaint schedule property was purchased with the fund obtained by the sale of her property. After the wife filed petition for maintenance the husband was trying to cut and remove valuable trees and she has prayed for a charge over the plaint schedule property for the maintenance claim. Therefore the contention that the suit itself was filed as a collusive suit does not appear to be correct.

8. The learned Counsel also argued that in the suit there was no prayer for future maintenance and the decree passed granting the decree for future maintenance

was not a proper decree. We perused the plaint and it is not stated in the plaint whether the plaintiff was claiming only past maintenance. In fact we find from the court fee paid that it is calculated on the basis of one year's maintenance amount and therefore the decree passed directing the husband to pay maintenance in future cannot be said to be without jurisdiction. At any rate the appellant who is not a party to the suit is not entitled to challenge the correctness of the decree.

9. The Supreme Court in *Nagubai v. B. Shama Rao* : [1956]1SCR451 had occasion to consider the impact of Section 52 of the Transfer of Property Act when there is a prayer for maintenance to be charged on a property and whether the transfer of the property pending, the suit for maintenance will be hit by the principle of *lis pendens*. The Supreme Court held that Section 52 is attracted and transfer is hit by the principle of *lis pendens*. Therefore for attracting Section 52 of the Transfer of Property Act it need not necessarily be a suit relating to a property. It is sufficient if a charge is claimed in respect of the property. In that case also the prohibition contained in Section 52 is attracted and any transfer after the filing of the suit will be hit by Section 52 of the Transfer of Property Act. In this case admittedly the purchase of the property by the appellant was after the suit for maintenance claiming charge over the plaint schedule property. Therefore even if the appellant is a bona fide purchaser he cannot claim any right in preference to the claim for charge as ordered by the Civil Court. In that view of the matter also the appellant is not entitled to succeed.

In the result the Execution First Appeal is dismissed without any order as to costs.

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