

Vijayalekshmi and Another Vs. Sherly @ Margret and Others

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Court : Kerala

Decided On : Apr-12-2011

Reported in : 2011(2)KLT460; 2011(2)ILR(Ker)595; 2011(2)KLJ652

Judge : K.T. Sankaran

Appeal No. : Op(C).No. 1522 of 2011 (O)

Appellant : Vijayalekshmi and Another

Respondent : Sherly @ Margret and Others

Judgement :

Respondents 1 to 4 instituted O.S.No.1359 of 2009 on the file of the court of the First Additional Subordinate Judges Court, Thiruvananthapuram against the fifth respondent for a decree for realization of Rs. 12,71,500/- with interest with a prayer to make the plaint schedule property a charge for the decree amount. It was alleged by the plaintiffs that the defendant agreed to sell the plaint schedule property to the predecessor in interest of the plaintiffs for a sale consideration of Rs. 15,79,300/- and he received a sum of Rs. One lakh as advance. Subsequently, various amounts were paid to the defendant. According to the plaintiffs, they paid a total sum of Rs. 11 lakhs to the defendant.

2. The suit was filed on 21.11.2009. I.A.No. 3037 of 2009 was filed for attachment before judgment of the plaint schedule property. An order of attachment was passed on 3.4.2010.

3. The petitioners, claiming that they are the assignees of the property from the defendant as per the sale deed executed on 18.3.2010, filed I.A.No. 881 of 2010 under Rule 8 of Order XXXVIII of the Code of Civil Procedure praying for lifting the order of attachment. The petitioners contended that on 4.12.2009, the defendant entered into an agreement for sale with the petitioners in respect of the plaint schedule property. Sale deed was executed on 18.3.2010. The petitioners contended that the agreement for sale and the sale deed were executed before passing the order of attachment on 3.4.2010. The plaintiffs filed objection to the claim petition. The claim petition is pending disposal.

4. Later, the plaintiffs filed I.A.No.5221 of 2010 to implead the petitioners as additional defendants. In the affidavit accompanying the application, the plaintiffs stated that the assignment deed was executed by the defendant to defeat and defraud the plaintiffs and to defeat the decree that may be passed against him. The plaintiffs also filed I.A.No.5220 of 2010 for consequential amendment of the plaint, on the impleadment of the petitioners as additional defendants. The court below allowed I.A.Nos.5220 of 2010 and 5221 of 2010 and 5221 of 2010, which are under challenge in this Original Petition at the instance of the assignees who are sought to be impleaded.

5. Learned counsel for the petitioners contended that no relief can be granted against the petitioners as they have obtained assignment of the property before the attachment was effected. The applications for impleading and for consequential amendment were filed after the claim petition was filed by the petitioners under Rule 8 of Order XXXVIII of the Code of Civil Procedure and therefore, the applications are not maintainable. Learned counsel for the petitioners also submitted that if the plaint is amended, it will relate back to the date of plaint in which case a contention under Section 52 of the Transfer of Property Act could be put forward by the plaintiffs against the additional defendants.

6. The relief sought for against the defendant is for realization of money charged on the immovable property. No relief for realization of money as such is claimed against the petitioners. However, if a charge decree is passed by the court, the

petitioners also would be bound by that decree. The plaintiffs wanted to avoid any contention at the execution stage that the petitioners are not bound by the decree that may be passed against the defendant and which may be charged on the plaint schedule property. That is why the petitioners are sought to be impleaded as additional defendants. The additional defendants sought to be impleaded (petitioners) cannot say that they should not be impleaded in the suit. Had the assignment in favour of the petitioners took place before the date of suit, nothing would prevent the plaintiffs from arraying the petitioners as defendants in the suit. But the fact that the transaction in favour of the petitioners took place subsequent to the suit would not deprive the right of the plaintiffs to file an application to implead the petitioners as additional defendants. Rule 10 of Order XXII of the Code of Civil Procedure provides for continuing a suit against the assignee of a party in cases where the assignment takes place during the pendency of the suit. Therefore, it cannot be said that the court below erred in allowing the application for impleading the petitioners.

7. The contention raised by the petitioners that the application for impleading filed after the filing of the claim petition by the petitioners should not have been allowed, is equally unsustainable. The fact that the petitioners filed a claim petition under Rule 8 of Order XXXVIII C.P.C. would not deprive the plaintiffs from making an application to implead the petitioners, the latter being the assignees of the property subsequent to the institution of the suit. Even without any application, by exercising the power under Sub Rule 2 of Rule 10 of Order I, the court can add any party, whose presence is found to be necessary by the court for a complete and effectual disposal of the suit. The party who is sought to be impleaded could defend the suit and put forward all the contentions that are available to him under law. Such right would not extend to a right to object to the impleading.

8. The contention raised by the learned counsel for the petitioners that if the amendment of the plaint is allowed, it would relate back to the date of the plaint and that would affect the interest of the petitioners as the plaintiffs may be entitled to raise a plea under Section 52 of the Transfer of Property Act, need not be considered at this stage. Whether Section 52 of the Transfer of Property Act applies or not, is a question to be considered at the trial of the suit.

9. I am of the view of the orders passed by the court below are legal and proper. There is no jurisdictional error or error of law warranting interference under Article 227 of the Constitution of India.

The Original Petition is accordingly dismissed.

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