

Seema Vs. Johny Thomas

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Court : Kerala

Decided On : Jan-18-2012

Judge : Thomas P. Joseph

Appeal No. : R.S.A. Nos.991 & 1408 of 2011

Appellant : Seema

Respondent : Johny Thomas

Judgement :

1. These second appeals arise from the common judgment and decree of learned first Additional District Judge, Ernakulam in A.S.Nos.210 and 217 of 2007 arising from the judgment and decree of learned Second Additional Sub Judge, Ernakulam in O.S.Nos.561 of 1999 and 185 of 2002. For the sake of convenience parties are referred as plaintiffs and defendants as in O.S.No.561 of 1999.

2. Appellants/plaintiffs filed O.S.No.561 of 1999 for a declaration that Exts.X1 to X3, assignment deeds are null and void and for a mandatory injunction to direct defendants 3 and 4 to vacate from the ground floor of the building in question. The suit property in O.S.No.561 of 1999 is 8.190 cents and building situated thereon. According to the plaintiffs, at a time when they were engaged in construction of the building they fell short of money and approached defendants 1 and 2 for a loan. Defendants 1 and 2 agreed to lend Rs. 5,00,000/- . It was agreed that plaintiffs will execute mortgage deeds in favour of defendants 1 and 2. Accordingly, defendants

1 and 2 , made available loan but, less Rs. 1,10,000/- which defendants 1 and 2 appropriated as advance interest etc. Pursuant to the agreement with defendants 1 and 2, plaintiffs 1 and 2 executed Exts.X2 and X3, document Nos.1953 and 1954 of 1998 on 08.06.1998 in favour of defendants 1 and 2 under the impression that the said documents are mortgage deeds. Later, there was some difference of opinion with defendants 1 and 2 which the latter threatened plaintiffs that based on the 'sale deeds' plaintiffs have executed, they will take action. According to plaintiffs, it is only then that they learned that the documents they have executed (Exts.X2 and X3 dated 08.06.1998) are sale deeds in favour of defendants 1 and 2. Thereon, plaintiffs filed O.S.No.561 of 1999 to declare that Exts.X2 and X3 are null and void. Along with the institution of suit plaintiffs filed I.A.No.4998 of 1999 for an order of temporary injunction to restrain defendants 1 and 2 dealing with the suit property. It is submitted that the said application was posted on 14.10.1999. On defendants 1 and 2 taking time, the application was posted on 05.11.1999. Defendants 1 and 2 on 16.10.1999 executed Ext.X1, sale deed No.4359 of 1991 in favour of defendants 3 and 4. It is the further case of plaintiffs that pursuant to Ext.X1, assignment deed defendants 3 and 4 forcibly occupied the ground floor of the building. Thereon plaintiffs got plaint in O.S.No.561 of 1999 amended to incorporate a prayer that Ext. X1 also may be declared as null and void and for mandatory injunction to direct defendants 3 and 4 to vacate the ground floor of the building.

3. Defendants 1 and 2 contested the suit and claimed that Exts.X2 and X3 are assignment deeds in their favour, taken for consideration. They denied that there was any loan transaction between them and plaintiffs or any agreement to execute deeds of mortgage. They also claimed that they transferred the property to defendants 3 and 4 as per Ext.X1, dated 16.10.1999. Defendants 3 and 4 raised similar contentions and claimed that plaintiffs are licensees of first floor of the building on an agreement to pay fee of Rs. 2500/- per month. Defendants 3 and 4 filed O.S.No.185 of 2002 for a mandatory injunction to direct plaintiffs (in O.S.No.561 of 1999) to vacate first floor of the building and for recovery of Rs.1,16,000/- with interest @ 12% per annum being arrears of licensee with damages for future use and occupation. Plaintiffs in O.S.No.561 of 1999 who are defendants in O.S.No.185 of 2002 contended, as averred in the plaint in O.S.No.

561 of 1999 that as per the agreement with defendants 1 and 2, they executed Exts. X2 and X3 as if those documents are deeds of mortgage. They also contended that since those document are null and void, defendants 3 and 4 acquired no right over the suit property by virtue of Ext. X1, assignment deed dated 16.10.1999. Trial court tried the suits jointly and accepting the case of plaintiffs in O.S.No.561 of 1999 granted decree as prayed for while O.S.No.185 of 2002 was dismissed. Defendants 3 and 4 in O.S.No.561 of 1999 challenged judgment and decree in that case A.S.No.210 of 2007. They, as plaintiffs in O.S.No.185 of 2002 challenged dismissal of that suit in A.S.No.217 of 2007. Learned Additional District Judge reversing the judgment of the trial court held that the plea of plaintiffs that they have executed deeds of mortgages in favour of defendants 1 and 2 cannot be accepted since they being literate, young persons a plea of non est factum is not available to them. First appellate court also found that the plea of fraud raised by plaintiffs in O.S.No.561 of 1999 is not established. Consequence was reversal of judgment and decree of the trial court. O.S.No.561 of 1999 was dismissed and in O.S.No.185 of 2002 a decree was granted in favour of defendants 3 and 4 (plaintiffs in that suit) for mandatory injunction directing plaintiffs in O.S.No.561 of 1999 to vacate first floor of the building. Learned Additional District Judge did not grant any monetary relief as claimed by defendants S3 and 4 (as plaintiffs) in O.S.No.185 of 2002. Defendants 3 and 4 have not challenged that part of the decree in A.S.No.215 of 2007. On the other hand, plaintiffs in O.S.No.561 of 1999 who are defendants in O.S.No.185 of 2002 challenged the common judgment and decree of learned Additional District Judge in these second appeals raising the following substantial questions of law.

- (i) Is the lower appellate court right in observing that there is no sufficient pleading to support the plea of fraud ?
- (ii) Is the lower appellate court right in concluding that Ext.X3 is not hit by lis pendens?
- (iii) Has not the lower appellate court misdirected itself by taking into consideration the transaction relating to the car mentioned before the court below?

(iv) Is the lower appellate court correct in rejecting the loan transaction because of want of evidence like promissory note?

(v) Is the judgment and decree passed by the lower appellate court void for non payment of court fee?

4. Learned Senior Advocate for plaintiffs/appellants has contended that learned Additional District Judge has misread the contentions raised by the parties. It is contended that learned Additional District Judge has proceeded as if the plea raised by the plaintiffs is one of forgery of documents while there was no such contention raised by the plaintiffs. It is also contended by learned Senior Advocate that unlike in cases where there is fraud or misrepresentation as to the contents of documents which make the documents voidable, plaintiffs have pleaded that the very character of the documents is the result of the fraud. Reliance is placed on the decision in *Ningawwa v. Byrappa Shiddappa Hireknrabar and Ors.* (AIR 1968 SC 956). According to the learned Senior Advocate in such situation, plea of non est factum is not available in favour of the execute of the document. It is also contended that facts and circumstances of the case would support the plea of fraud and misrepresentation as to the character of Exts.X2 and X3. It is pointed out by learned Senior Advocate that while in Exts. X2 and X3 the sale consideration mentioned is Rs. 75,000/- each, in Ext. X1, assignment deed dated 16.10.1999 executed after an year of execution of Exts.X2 and X3 the sale consideration mentioned is Rs. 3,00,000/-. The same property was mortgaged by defendants 3 and 4 in favour of a Co-operative bank on 14.03.2000 for Rs. 6,00,000/-. According to the learned Senior Advocate, the meager sale consideration stipulated in Exts.X2 and X3 is an indication that the documents were got executed by fraud and misrepresentation as pleaded by the plaintiffs. In that view of the matter, it is contended that first appellate court was not correct in reversing the finding of fact entered by the Trial Court.

5. In the decision referred by the learned Senior Advocate, a distinction is drawn between fraud or misrepresentation as regards contents of documents and as to the character of documents. In the former, it is held that the document is merely voidable at the option of the party defrauded while in the latter; the document itself

is void since fraud and misrepresentation are as regards the very character of the document. That view has been followed in Prem Singh V. Birbal (2006 (2) KLT 863 (SC)) as well. It is held that a fraudulent misrepresentation as regards character of the document is void but fraudulent misrepresentation as regards contents of a document is voidable and that legal position will be different if there is fraudulent misrepresentation not merely as to the contents of the document but, as to its character.

6. Now the question is whether plea of fraud and misrepresentation raised by plaintiffs rejected by learned Additional District Judge is correct and involves and substantial question of law requiring this Court to entertain these second appeals. It is apposite to refer to the relevant averments in the plaint in O.S.No.561 of 1999. If Exts.X2 and X3 are found to be null and void in the circumstances pleaded by plaintiffs, Ext.X1 executed on the strength of Exts.X2 and X3 will also fall to the ground.

7. In paragraph 3 of O.S.No.561 of 2002 it is pleaded by plaintiffs that they approached defendants 1 and 2 for a loan of Rs.5,00,000/-, defendants 1 and 2 agreed to advance Rs.5,00,000/- as loan on condition that the rate of interest will be Rs.5/- for 100 Rupees per month. It is further stated that plaintiffs agreed to the terms and conditions stated by defendants 1 and 2.

“plaintiffs handed over their title deeds to defendants 1 and 2 for preparation of mortgage deed. On 8.6.1998 first plaintiff executed document No.1953 of 1998 S.R.O., Edappally believing that it is a mortgage deed in favour of the first defendant. So also second plaintiff on 8.6.1998 executed another documents No.1954 of 1998 S.R.O. Edappally in favour of second defendant believing that it is a mortgage deed”

8. In paragraph 4, reference is made to defendants 1 and 2 insisting for closing the loan transaction and there being some difference of opinion between them and the plaintiffs. It is averred that at that time, defendants 1 and 2 threatened plaintiffs that they will assign the property on the basis of sale deeds in their favour and on verification plaintiffs came to know that first plaintiff had executed sale deed No.1953 of 1998 S.R.O. Edappally in favour of first defendant showing a sale

consideration of Rs.75.000/- in respect of her right, over the plaint schedule property. So also 2nd plaintiff had executed sale deed No.1954 of 1998 S.R.O. Edappally in favour of second defendant showing a sale consideration of Rs 75,000/- in respect of her right over the plaint schedule property.

9. In paragraph 5, it is averred that knowing about the fraud committed by defendants 1 and 2, plaintiffs contacted the third defendant who is also a financier for a loan to discharge liability of defendants 1 and 2. Third defendant contacted defendants 1 and 2 and plaintiffs were informed that defendants 1 and 2 are ready and willing to receive Rs.5.5 lakhs towards full satisfaction of their claim against the plaintiffs. In paragraph 7, it is averred that plaintiffs understood that defendants 1 and 2 intended to sell the plaint schedule property on the basis of sale deed Nos.1953 and 1954 of 1998 S.R.O. Edappally (Exts.X2 and X3) in their favour and that defendants 1 and 2 had no right over the plaint schedule property. The said documents are void. Plaintiffs had loan transaction with defendants 1 and 2 and for security for the loan defendants 1 and 2 took documents from the plaintiffs making them believe that the documents taken from the plaintiffs are only mortgage deeds.

10. In short, going by the averments in the plaint what I am able to discern is that it is not a case where according to the plaintiffs they wanted to execute sale deeds in favour of defendants 1 and 2 as security for the loan transaction of the understanding that on repayment of the amount, there would be a re-conveyance, so that the documents were executed as a security for the loan transaction. On the other hand, the specific plea and stand taken by the plaintiff's as revealed from the above extracted averments in the plaint is that they wanted to execute only deeds of mortgage in favour of defendants 1 and 2 but, defendants 1 and 2 playing fraud and misrepresentation got executed sale deed Nos. 1953 and 1954 of 1998. According to the plaintiffs they were not aware, at the time those documents were executed and registered that they are executing sale deeds in favour of defendants 1 and 2 but they were under the belief and impression that the documents they are executing are deeds of mortgage.

11. The question is whether that claim of the plaintiffs would stand scrutiny of law and is supported by the evidence on record. There is no dispute that Exts.X2 and X3, document Nos.1953 and 1954 of 1998 are deeds of assignment of the suit property. There is also no contention that the said documents were to be understood as a security of the loan transaction. As above stated and as pointed out by the first appellate court, plaintiffs are literate young persons. It is difficult to believe that unaware of the character and/or contents of the documents plaintiffs 1 and 2 executed the documents and presented it for registration blindfolded. They have executed the documents with eyes wide open.

12. It is pointed out by learned Senior Advocate that the principle non est factum would apply only as regards contents of the document. But, contents of Exts.X2 and X3 show assignment of the suit property by the plaintiffs in favour of defendants 1 and 2 for consideration of Rs.75,000/-each. The documents are styled as assignment deeds. In that situation, there is no reason why the principle of non est factum should not apply to the fact situation. This Court in Mathu V. Cherchi (1990 (1) KLT 416) has held that a plea of non est factum cannot be raised when the executants are neither illiterate nor blind and the persons who are neither illiterate nor blind are bound by the documents they have executed whether they have read it or not.

13. Going by the plea raised by plaintiffs, it is certain that had they known that they are executing sale deeds they would not have subscribed their signature to those documents. For, they agreed only to execute mortgage deeds in favour of defendants 1 and 2. Therefore the plea that plaintiff were not aware of the contents and character of Exts. X2 and X3 at the time of execution is something which cannot be swallowed even with a handful of salt.

14. As regards due registration of Exts. X2 and X3 there is evidence of DW4, the Registrar. He has given evidence that Exts.X2 and X3 were produced before him by plaintiffs 1 and 2, respectively for registration. The Registrar would put questions to the executants whether they are alienating the property (when assignment deeds are produced for registration) and only, on getting satisfactory reply the documents will be registered.

15. Trial court was not very much impressed by the evidence of DW4. But first appellate court accepted that evidence. I must notice that evidence of DW4 gets support from S.34 of the Registration Act (for short, “the Act”). The said provision contemplates an enquiry by the registering officer before he registers the document. On appearance of the executant before the registering officer, the latter “shall” enquire whether or not such document was “executed” by the persons by whom it purports to be executed. It is contended by learned Senior Advocate that the above provision only as regards execution of the document and not as to the character of the document. But when S.34 (2)(a) of the Act deals with the document which was ‘executed’ by the person concerned. I must understand that the expression as meaning ‘due execution of the document’. ‘Execution’ contemplated in S.34 (2)(a) is due execution of the document which is presented for registration. It cannot be accepted that when plaintiffs wanted and agreed that deeds of mortgage were to be executed, believing the documents to be so, they subscribed their signature for execution and when those documents were presented for registration before DW4 plaintiffs 1 and 2 admitted that they have executed the documents which meant that they executed deeds of mortgage. That I think is not the purport of enquiry which the registering officer is required to conduct under S.34 of the Act.

16. The Supreme Court in Prem Singh V.Birbal (supra) in paragraph 27 stated:

“there is a presumption that a registered document is validly executed. The registered document however prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption.”

17. The above principle is reiterated in Vimal Chand Ghevarchand Jain and Ors, v. Ramakant Eknath Jadoo ((2009) 5 SCC713). There it is held a registered deed of sale carries the presumption that the transaction was a genuine one and that if execution of sale deed is proved, onus is on the defendant to prove that the deed is not executed and it was a sham document.

18. In Grasim Industries Limited and Anr.v. Agrwal Steel ((2010) 1 SCC83) it is held that when a person signs a document, presumption is that he has read the document properly and understood it and only then that has affixed his, signatures

thereon. That presumption cannot be rebutted by the mere statement of plaintiffs in this case, young, literate persons that they have not read the documents or the same were not read to them.

19. Yet another argument which learned Senior Advocate had advanced is based on consideration mentioned in Exts.X2,X3 and Ext.X1 and mortgage of the property to the bank. No doubt, in Exts.X2 and X3 dated 08.06.1998 sale consideration mentioned is Rs.75,000/-each while Ext.X1 dated 16.10.1999 sale consideration stated is Rs. 3,00,000/- Evidence is that defendants 3 and 4 availed a loan of Rs. 6,00,000/- on the security of mortgage of the suit property on 14.3.2000. Ext.X1 is executed by defendants 1 and 2 jointly about an year and four months after Exts.X2 and X3. The sale consideration in Exts.X2 and X3 together will come to Rs. 1,50,000/- and after one year and four months sale consideration mentioned in Ext.X1 is Rs.3,00,000/-. The above, or that on 14.3.2000 defendants 3 and 4 were able to secure a loan of Rs. 6,00,000/- on the security of the property is not sufficient to rebut the presumption against plaintiffs 1 and 2. I am inclined to think that the factual situations in the case are not sufficient to rebut the presumption against plaintiffs 1 and 2. Learned Additional District Judge has considered the evidence and come to the right conclusion.

20. Having heard learned Senior Advocated for appellants/plaintiffs and gone through the judgments under challenge I do not find any substantial question of law arising in these appeals for a decision so that appeals are to be entertained.

These second appeals are dismissed.

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