(2012) 01 KL CK 0126

High Court Of Kerala

Case No: A.F.A. No. 59 of 1994

Vasu @ Bhaskaran		APPELLANT
	Vs	
Parukutty Amma and Another		RESPONDENT

Date of Decision: Jan. 13, 2012

Acts Referred:

- Contract Act, 1872 - Section 10
- Evidence Act, 1872 - Section 91, 92
- Kerala High Court Act, 1958 - Section 5

Citation: (2012) 1 KLJ 518

Hon'ble Judges: V. Ramkumar, J; K. Harilal, J

Bench: Division Bench

Advocate: D. Krishna Prasad, Joji Varghese and M. Hari Sharma, P.N. Krishnankutty Achan (Sr.), for the Respondent

Judgement

V. Ramkumar, J.

In this intra-court appeal filed u/s 5 of the Kerala High Court Act, 1958, the sole plaintiff in O.S. No. 223 of 1983 on the file of the Subordinate Judge''s Court, Thrissur, challenges the appellate Judgment and decree passed by a learned single Judge of this Court in A.S. 441 of 1988. The said suit was one for realisation of a sum of Rs. 20,000/- from the appellants'' step mother one Parukutty Amma and her daughter Sukumari on the allegation that the said amount was the sale consideration due to the appellant under Exts. A1 to A3 sale deeds.

JOINT-TRIAL-The partition suit

The present suit was jointly tried along with O.S. No. 182 of 1983 which was a suit filed by the said Parukutty Amma and her daughter Sukumari seeking partition and separate possession of 2/3 shares over 6 items of immovable properties described in the plaint schedule. In the partition suit the mother and daughter alleged that the suit properties absolutely belonged to late P. Narayanan Ezhuthassan, that before

Narayanan Ezhuthassan married Parukutty Amma, eventhough he had executed a will in the year 1945 purporting to bequeath the suit properties in favour of his two sons Vasu @ Bhaskaran (the appellant herein) and his brother Sukumaran with regard to the suit properties, Narayanan Ezhuthassan never intended to give effect to the will, that Parukutty Amma and Sukumari were living together along with Vasu @ Bhaskaran and his brother Sukumaran, that the suit properties were jointly enjoyed by all of them and that the appellant had consciously abandoned his rights under the will in respect of the properties covered by the will. The mother and daughter further alleged that while the said properties were enjoyed by all of them jointly, portions of the properties were jointly sold away by them in the years 1973, 1978 and 1981 as evidenced by Exts. B4 to B6 and A1 to A3. Thus, in O.S. 182 of 1983 Parukutty Amma and her daughter Sukumari claimed 2/3 shares over the suit properties. The appellant herein and his wife and children were the defendants in the partition suit.

DEFENCE TO THE PARTITION SUIT

2. The appellant besides maintaining his contentions in the present suit (O.S. 223/1983) resisted the partition suit contending inter alia as follows:-

Even before Narayanan Ezhuthassan had married Parukutty Amma, he had executed Ext.A1 registered will as per which the plaint schedule properties except item 5 (admeasuring 66 cents) were bequeathed to the appellant Vasu @ Bhaskaran) and his brother Sukumaran. Subsequently, Narayanan Ezhuthassan married Parukutty Amma. Sukumari is the daughter born to Narayanan Ezhuthassan in Parukutty Amma. Till the death of Narayanan Ezhuthassan, Parukutty Amma was ostensibly looking after the appellant and his brother Sukumaran as her own children only for the purpose of pleasing her husband Narayanan Ezhuthassan. Eventhough, on the death of Narayanan Ezhuthassan in the year 1953 the suit properties had vested in the appellant and his brother Sukumaran, Parukutty Amma had fraudulently concealed Ext.A16 will executed by Narayanan Ezhuthassan from the appellant and his brother Sukumaran. Parukutty Amma got Sukumaran involved in a criminal case and he was forced to leave the place fearing the police in the year 1969. Eversince then the whereabouts of Sukumaran are not known and he is, therefore, to be presumed to be no more. Exts. B4 to B6 and A1 to A3 sale deeds were jointly executed by Parukutty Amma appellant was made to believe that he was a joint owner along with Parukutty Amma. It was only subsequent to Ext.A1 to A3 sale deeds in the year 1981 that the appellant came to know of Ext.A16 will executed by his father. Parukutty Amma and her daughter Sukumari have no rights at all over the properties bequeathed to the appellant and his brother Sukumaran and which after the prolonged disappearance of Sukumaran have vested absolutely in the appellant O.S. No. 223/83 filed by the appellant may, therefore, be decreed and O.S. 182/1983 filed by Parukutty Amma and Sukumari for partition may be dismissed.

THE PRESENT SUIT

3. The present suit O.S. 223 of 1983 was filed by the appellant against his step mother Parukutty Amma and her daughter Sukumari for realisation of a sum of `20,000/- deposited by Parukutty Amma in the Pazhampalakkode branch of the Canara Bank, being portion of the total sale consideration of `42,000/- obtained under Exts.A1 to A3 sale deeds and allegedly appropriated by Parukutty Amma to the exclusion of the appellant.

DEFENCE TO THE PRESENT SUIT

4. Parakutty Amma and her daughter Sukumari resisted the present suit filed by the appellant contending inter alia that the total sale consideration received under Exts. A1 to A3 was only Rs. 4,400 and the claim of the appellant that under Ext. A16 will executed by Narayanan Ezhuthassan the suit properties were bequeathed in favour the appellant and his brother Sukumaran and consequent on the abscondance of Sukumaran from the year 1969 onwards the appellant was exclusively entitled to the suit properties and he was, therefore, entitled to the sale consideration received under Exts. A1 to A3, was not sustainable. The mother and daughter accordingly prayed for dismissal of the suit.

THE TRIAL

5. O.S. 182/1983 and O.S. 223/1983 were jointly tried by the Subordinate Judge. O.S. 223/1983 in which the appellant was the sole plaintiff was treated as the leading case and evidence was adduced in that case. The parties were referred to according to their rank in O.S. No. 223/1983. On the side of the appellant he examined himself as P.W. 1 and also examined two other witnesses as PWs 2 and 3. P.W. 2 is a person who happened to be present in the Sub Registry office and to whom Narayanan Ezhuthassan had mentioned about the execution of Ext.A16 will. P.W. 3 was the broker behind Exts. A1 to A3 sale deeds and he proved that the real consideration paid under the said sale deeds was Rs. 42,000/- and not Rs. 4,400/- as recited in those documents. Exts. A1 to A16 were also got marked on the side of the appellant. On the side of Parakutty Amma and her daughter, Parukutty Amma examined herself as DW1. DWs 2 and 4 were examined on the side of Parukutty Amma to depose before Court that the appellant was aware of the will executed by his father. But the trial Court was not inclined to accept the said version of Dws 2 and 4. DW3 was another witness examined by her to prove that when the properties of the family of Parukutty Amma were partitioned a sum of Rs. 50,000/- was paid to the appellant herein. He was disbelieved by the trial Court.

THE VERDICTS OF THE COURTS BELOW

6. The learned Subordinate Judge after a joint trial of the two suits, as per common judgment and separate decrees dated 12-08-1988 dismissed O.S. 182 of 1983 upholding Ext.A16 will but decreed O.S. 223 of 1983 as prayed for. There is no

dispute that the judgment and decree dismissing the partition suit O.S. 182/1983 were confirmed in appeal to this Court as A.S. No. 432/1988 and further appeal to a Division Bench of this Court in A.F.A. No. 69 of 1994.

7. Aggrieved by the decree passed in O.S. 223/1983 Parukutty Amma and her daughter (the defendants in the suit) filed A.S. 441 of 1988 before this Court. A learned Single Judge of this Court as per judgment and decree dated 21-01-1994 reversed the decree passed by the trial Court and dismissed the suit after holding that it was Vasu @ Bhaskaran (the plaintiff) himself who had received the sale consideration under Exts.A1 to A3 and that the sale consideration so received was Rs. 4,400/- and that his claim for Rs. 20,000/- was unsustainable. It is aggrieved by the said appellate decree that the plaintiff (Vasu @ Bhaskaran) has come up in further appeal to the Division Bench.

THIS APPEAL

8. We heard Senior Advocate Sri. P.N. Krishnankutty Achan, the Learned Counsel appearing for the appellant/plaintiff and Advocate Sri. Krishna Prasad the Learned Counsel appearing for the respondents/defendants.

ARGUMENT OF THE APPELLANT

9. Senior Advocate Sri. P.N.K. Achan appearing for the appellant made the following submissions before us in support of the appeal:-

This is a case in which P(sic)ukkutty Amma who was the step mother of the appellant had received Rs. 42,000/- under Ext.A1 to A3 as spoken to by P.W. 3 who was the broker instrumental for the transaction. The trial Judge had chosen to believe him and Rs. 20,000/- is the amount withdrawn by Parukutty Amma from the Pazhampalakkode branch of the Canara Bank. In the light of the findings which have become final to the effect that the properties exclusively belong to the appellant and his brother under Ext.A16 will executed by their father, Parukutty Amma had absolutely no authority either to receive or appropriate any amount towards the sale consideration for the properties sold under Exts. A1 to A3. She was actually practicing a fraud on the appellant by making him believe that he was only a co-owner of the properties left behind by Narayanan Ezhuthassan. Process of the Court was being abused by Parukutty Amma for "retaining with her the ill-gotten gains indefinitely. A person whose case is based on falsehood has no right to approach the Court and can be summarily thrown out at any stage of the litigation (See paragraph 5 of S.P. Chengalvaraya Naidu v. Jagannath -1994 (1) SCC 1). The trial Judge who had the unique advantage of seeing the witnesses and assessing their credibility had chosen to believe P.Ws 1 to 3 while decreeing the suit. Since in Exts. A to A3 sale deeds the vendors alone have signed, they are strictly not contracts so as to attract under Sections 91 and 92 of the Evidence Act. The learned appellate Judge was not justified in reversing the decree after dislodging the findings recorded by the trial Court.

JUDICIAL RESOLUTION

10. We are afraid that we find ourselves unable to agree with the above submissions made on behalf of the appellant. The background facts

11. The undisputed facts leading to the institution of the present suit are as follows:-

The immovable properties in dispute belonged to late P. Narayanan Ezhuthassan. He was employed in Malaya. While so, he fell in love with one Gouri. Two children, Vasu @ Bhaskaran (who is the appellant herein) and Sukumaran were born in that relationship in which there was no marriage. But Gouri did not live long. On the death of Gouri, Narayanan Ezhuthassan returned to his native place in Kerala along with the appellant and his brother Sukumaran. On 8-11-1944, Narayanan Ezhuthassan executed Ext. A16 will bequeathing the plaint schedule properties (6 items) in O.S. 182/1983 (partition suit) except item 5 (admeasuring 66 cents) to the appellant Vasu @ Bhaskaran and his brother Sukumaran. The said document was got registered on 8-11-1947 by Narayanan Ezhuthassan as Will No. 7 of 1123 M.E. (corresponding to 1947) of the District Registrar, Trichur. Subsequently, Narayanan Ezhuthassan married the first defendant Parukutty Amma. Sukumari the second defendant was born in that wedlock. While Narayanan Ezhuthassan was residing along with defendants 1, 2 and the appellant and Sukumaran, Narayanan Ezhuthassan died in the year 1953. Some time in the year 1969, Sukumaran was involved in a murder case and he left the place fearing the police. Thereafter his whereabouts were not known by his near relations who were bound to hear from him. Sukumaran was thus presumed to be dead. Without being aware of Ext.A16 registered will executed by Narayanan Ezhuthassan, the appellant (Vasu @ Bhaskaran) joined his step mother Parukutty Amma (first defendant) in executing Exts. B4 to B6 and A1 to A6 sale deeds during the period from 1973 to 1981 for disposing of a couple of items left behind by Narayanan Ezhuthassan and bequeathed by him in favour of his sons. The appellant on coming to know of Ext.A16 Will executed by his father Narayanan Ezhuthassan, filed a suit O.S. 96 of 1982 before the Munsiff''s Court, Wadakkancherry against Parukutty Amma, Sukumari & Others and obtained Ext. B2 order of interim injunction dated 10-2-1983 against the defendants therein. This led to Parukutty Amma and her daughter filing the partition suit O.S. 182/1983. The said suit stands dismissed upholding Ext.A16 Will in favour of the two sons (including the appellant) of Narayanan Ezhuthassan. It was during the pendency of the partition suit that the appellant instituted the present suit for realisation of Rs. 20,000/- .

12. The only question which survives for consideration in this appeal is as to whether the dismissal of the present suit (O.S. 223/1983) by the learned Judge of this Court in appeal after reversing the decree passed by the trial court is sustainable or not. No doubt, oral evidence was adduced on the side of the appellant to show that the actual sale consideration received under Ext. A1 to A3 sale deeds was Rs. 42,000/- as against Rs. 4,400/- recited in those documents. The trial Court was

mainly carried away by the above evidence to come to the conclusion that Parukutty Amma, without any right over the property, might have received the said amount and the withdrawal of Rs. 20,000/- by her from the Pazhampalakkode branch of the Canara Bank really belonged to the appellant, being the sale consideration due to him and which was appropriated by Parukutty Amma. The learned Single Judge of this Court, however, in appeal held that since the appellant was the sole male member in the family, in the ordinary course he alone would have received the sale consideration under Exts.A1 to A3 documents and believing the testimony of Parukutty Amma that it was the appellant who received the sale consideration and that the amount of sale consideration so received was Rs. 4,400/- , reversed the decree passed by the trial court. The learned Judge, accordingly, dismissed the suit.

13. It was really unnecessary for the trial Judge as well as the appellate Judge to evaluate or re-appreciate the evidence and come to a conclusion either way on the quantum of consideration received under Exts. A1 to A3. This is because the contention of the appellant that the sale consideration received under Exts. A1 to A3 was not Rs. 4,400/- as recited in the documents but was Rs. 42,000/- as attempted to be proved through oral evidence, was really not entertainable in view of the bar under Sections 91 and 92 of the Indian Evidence Act.

14. It is not open to a party to a document to prove by oral evidence a variation in the terms of the document or as to the amount of consideration shown in the document. Parole evidence given for the purpose of proving variation in the amount of consideration shown in the document would be inadmissible under Sec. 92 of the Evidence Act. (Vide CP. Mallappa v. Matum Nagu Chetty - ILR 42 Mad. 41 (FB); (Lal) Behari Lal Vs. Allahabad Bank, Ltd. and Another, ; Mohammad Taki Khan Vs. Jang Singh, (See the separate judgments of Sulaiman, CJ. and Bennet, J); Bai Hiradevi and Others Vs. Official Assignee of Bombay and Others, ; K.S. Narasimhachari Vs. The Indo Commercial Bank Ltd., G.T. Madras and Another, ; Krishnaswami Iyer v. Ouseph Mathai - 1960 KLT 990: S. Rajana v. S.M. Thondusa-AIR 1970 Mysore 270; Ambikakumari v. Ramakrishnan -1991 (2) KLT 728). The above legal position has been recognized by the Supreme Court also in Krishi Utpadan Mandi Samiti Sahaswan District Badaun through its Secretary Vs. Bipin Kumar and Another, where the Apex Court has held thus:-

Section 92 of the Evidence Act precludes a party from leading evidence contrary to the terms of a written document It was, therefore, not open to the respondent to urge that, even though his sale deed showed a price of Rs. 15.40 per sq. yard the retd market value was Rs. 120 per sq. yard. To permit a party to so urge would be to give a premium to dishonesty. Parties who undervalue their documents, for purpose of payment of stamp duty, cannot be allowed to then claim that their own documents do not reflect the correct market value.

But the bar under Sections 91 and 92 of the Evidence Act will not apply for proving want of consideration or failure of consideration. (See Sah Lalchand v. Inderjit - ILR

22 All. 370 (P.C.); Mohammad Taki Khan Vs. Jang Singh, ; Radhamohan Thakur and Others Vs. Bipin Behari Mitra and Another, ; Baldeo Singh and Others Vs. Dwarika Singh and Others, ; Thommen v. Taluk Land Board - 1976 KLT 840; Kunhammed Kutty v. Avokker-1984 KLT 716; Mathew v. Lekshmanan-1990 (2) KLT 446).

15. It is true that Exts. A1 to A3, sale deeds only contain the signature of the vendors thereunder and not the respective vendees. But that will not render those sale deeds invalid as contracts for want of mutuality on the ground that they are only unilateral instruments. All that is necessary is to ensure that the essential parts of a modern conveyance namely, the "parties, the recitals, testatum, operative words, parcels, habendum and testimonium" are present in the instrument. (Chekku Moulavi v. Kunju -1962 KLT 596). After the decision of the Apex Court in Aloka Bose v. Parmatma Devi and Others -(2009) 2 SCC 582, there is no scope any more for anybody to contend that an agreement for sale or a sale deed (deed of conveyance) executed by the prospective vendor or the vendor, as the case may be, is a unilateral document or instrument and is not a contract which can be enforced in law. In the course of the discussion the Apex Court in that decision observed as follows:-

16. On the other hand, the observation in S.M. Gopal Chetty v. Raman -(AIR 1998 Madras 169) that unless agreement is signed both by the vendor and purchaser, it is not a valid contract is also not sound. An agreement of sale comes into existence when the vendor agrees to sell and the purchaser agrees to purchase, for an agreed consideration on agreed terms. It can be oral. It can be by exchange of communications which may or may not be signed. It may be by a single document signed by both parties. It can also be by a document in two parts, each party signing one copy and then exchanging the signed copy as a consequence of which the purchaser has the copy signed by the vendor and a vendor has a copy signed by the purchaser. Or it can be by the vendor executing the document and delivering it to the purchaser who accepts it

17. Section 10 of the Act provides that all agreements are contracts if they are made by the free consent by the parties competent to contract, for a lawful consideration and with a lawful object, and are not expressly declared to be void under the provisions of the Contract Act The proviso to Section 10 of the Act makes it clear that the section will not apply to contracts which are required to be made in writing or in the presence of witnesses or any law relating to registration of documents. Our attention has not been drawn to any law applicable in Bihar at the relevant time, which requires an agreement of sale to be made in writing or in the presence of witnesses or to be registered. Therefore, even an oral agreement to sell is valid. If so, a written agreement signed by one of the parties, if it evidences such an oral agreement will also be valid.

18. In any agreement of sale, the terms are always negotiated and thereafter reduced in the form of an agreement of sale and signed by both parties or the vendor alone (unless it is by a series of offers and counter-offers by letters or other

modes of recognised communication). In India, an agreement of sale signed by the vendor alone and delivered to the purchaser, and accepted by the purchaser, has always been considered to be a valid contract In the event of breach by the vendor, it can be specifically enforced by the purchaser. There is, however, no practice of purchaser alone signing an agreement of sale.

19. The defendant next contended that the agreement of sale in this case (Ext.2) was clearly in a form which required signatures of both the vendor and purchaser. It is pointed out that the agreement begins as: "Agreement for sale between

Kanika Bose and Parmatma Devi" and not an "Agreement of sale executed by Kanika Bose in favour of Parmatma Devi". Our attention is also drawn to the testimonium clause (the provision at the end of the instrument stating when and by whom it was signed) of the agreement, which reads thus:

In witnesses whereof, the parties hereto have hereunto set and subscribed their respective hands and seals on these presents.

It is therefore contended that the agreement specifically contemplated execution by both parties; and as it was not so executed, it was incomplete and unenforceable.

20. We have carefully examined the agreement (Ext.2), a photocopy of which is produced. The testimonium portion in the agreement is in an archaic form which has lost its meaning. Parties no longer "subscribe their respective hands and seals". It is true that the format obviously contemplates signature by both parties. But it is clear that the intention of the parties was that it should be complete on signature by only the vendor. This is evident from the fact that the document is signed by the vendor and duly witnessed by four witnesses and-was delivered to the purchaser. Apart from a separate endorsement made on the date of the agreement itself (7-9-1979) by the vendor acknowledging the receipt of Rs. 2001 as advance, it also contains a second endorsement (which is also duly witnessed) made on 10-10-1979 by the vendor, acknowledging the receipt of a further sum of Rs. 2000 and confirming that the total earnest money received was Rs. 4001. This shows that the purchaser accepted and acted in terms of the agreement which was singed, witnessed and delivered to her as a complete instrument and that she then obtained an endorsement thereon by the vendor, in regard to second payment If the agreement was not complete, the vendor would not have received a further amount and endorsed an acknowledgment thereon on 10-10-1979.

21. Apart from the above, the evidence of witnesses also shows that there was a concluded contract Therefore, even though the draftsman who prepared the agreement might have used a format intended for execution by both vendor and purchaser, the manner in which the parties had proceeded, clearly demonstrated that it was intended to be executed only by the vendor alone.

22. Thus we hold that the agreement of sale (Ext.A2) signed only by the vendor was valid and enforceable by the purchaser.

(emphasis supplied)

Thus, Exts. A1 to A3 which contain the signatures of the vendors only and which do not contain the signatures of the vendees as well, are also contracts within the meaning of Sec. 91 of the Evidence Act and attracting the exclusion of oral evidence under Sec. 92 for the purpose of contradicting, varying, adding to or subtracting from the terms of such contract. Even otherwise those documents constitute disposition of property reduced to the form of document as required by law and that is sufficient to attract the embargo against the reception of parole evidence under Sec. 92 of the Evidence Act.

16. Equally misconceived is the argument that Parukutty Amma had played a fraud on the appellant and she, therefore, had no right to approach the Court and claim reliefs against the appellant. Apart from the fact that there was no pleading in the plaint that fraud was practiced on the appellant by S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, has no application at all to the facts of this case. What the Apex Court considered in that decision was whether the decision of a court secured by a party by practicing fraud on the court had any sanctity at all. But in the present case the appellant has no case that any fraud was practiced on the Court or that any verdict was secured by Parukutty Amma by practicing fraud.

17. As per the evidence on record and the findings in the impunged judgment, it was the appellant who had received the sale consideration under Exts. A1 to A3. Having admittedly joined Parukutty Amma in executing Exts. A1 to A3, the appellant should have either elected to disown the entire documents or should have accepted them in their entirety. The doctrine of election prohibits him from instituting a suit of this nature. (See C. Beepathumma and Others Vs. V.S. Kadambolithaya and Others, ; New Bihar Biri Leaves Co. and Others Vs. State of Bihar and Others, ; Para 53 of Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport and Another, . The suit was liable to be dismissed for that reason as well. The result of the foregoing discussion is that the judgment and decree passed by the learned Judge in appeal do not call for any interference although for different reasons. This appeal is accordingly, dismissed. There shall be no order as to costs.