C.P. Amina Vs T.M. Kunhavaran and Others

Court: High Court Of Kerala

Date of Decision: March 21, 2012

Hon'ble Judges: Thomas P. Joseph, J

Bench: Single Bench

Advocate: P. Venugopal and Smt. M.M. Deepa, for the Appellant;

Final Decision: Dismissed

Judgement

Thomas P. Joseph, J.
The plaintiff in O.S.No.418 of 2005 of the court of Principal Munsiff, Kozhikode-II sought partition of plaint B

schedule tracing title under her father who died in the year, 1992. The trial court found against the claim and dismissed the suit. That was confirmed

by the learned Sub-Judge, Kozhikode in A.S.No.57 of 2009. Hence this second appeal. The suit property originally belonged to Kunhimoyi,

father of appellant/ plaintiff as per Ext.A1, assignment deed which covers 40 cents. According to the plaintiff, a document of sale is seen to be

created in the name of the 3rd defendant in the year, 1983 but that document is invalid since Kunhimoyi was not in sound disposing state of mind

when that document is said to be executed. It is further contended that at any rate, what is assigned by the said document is only 7.50 cents and

the balance 32.50 cents is available for partition.

2. Defendants 1 to 3 contended that Kunhimoyi assigned the entire 40 cents to the 3rd defendant as per Ext.B22, assignment deed No.2352 of

1983. The said document recited that certain amounts are to be paid to the plaintiff, defendants 4 and 5 and the late Ithinam within five years from

the date of sale. Defendants 1 to 3 contended that 3rd defendant offered the said amounts, but it was not accepted by the said persons. They

denied that as per Ext.B22, only 7.50 cents was assigned. According to them, while mentioning the side measurement of the first tak in the

document, there happened to be an error. They also contended that 3rd defendant assigned plaint B schedule to supplemental defendants 15 and

16 as per Ext.B23 and supplemental defendants 15 and 16 sold 12.35 cents to the supplemental 17th defendant as per Ext.B27, assignment deed

No.258 of 2006. Thus, the plaint B schedule is not available for partition.

3. Supplemental defendants also raised similar contentions as above.

4. In the trial court, DW5, the scribe was examined to prove Ext.B22. He stated that while describing the first tak of plaint B schedule in Ext.B22,

there happened to be an error in mentioning the side measurements as 1 > kole instead of 21 > kole. Trial court accepted the explanation, found

that the entire property was sold as per Ext.B22 followed by the subsequent assignments and hence, no property is available for partition.

Accordingly, the suit was dismissed. First appellate court confirmed the finding. Hence, this second appeal.

5. Learned counsel contended that there is no proper proof for the due execution of Ext.B22 by Kunhimoyi. It is also contended that at any rate,

what is assigned as per Ext.B22 is only 7.50 cents and the balance 32.50 cents is available for partition.

6. So far as the contention that Kunhimoyi was not having sound disposing state of mind at the time he executed Ext.B22 in the year, 1983 is

concerned, evidence is given by PW1, husband of plaintiff. But it is seen from Ext.B1, complaint preferred by the plaintiff that there is no mention

in that complaint about any mental illness for Kunhimoyi at the time Ext.B22 was executed. Moreover, DW5, the scribe has given evidence

regarding the due execution of Ext.B22. Ext.B22 is admitted by the second defendant, the son of Kunhimoyi, when examined as DW1. I must also

remember that the said document, executed and registered in the year, 1983 is being challenged in the year, 2005 on the ground that the executant

was not in a sound disposing state of mind at the time of its execution. That the documents is duly registered also raises some presumption for its

due execution. No evidence worth the same adduced to prove that Kunhimoyi was not having sound disposing state of mind at the time Ext.B22

was executed. That contention was rightly rejected and it involves no substantial question of law.

7. As regards the contention that Ext.B22 concerns only 7.50 cents out of the 40 cents is concerned, courts below accepted the explanation of

defendants 1 to 3 and spoken by DW5, the scribe. I have given by a copy of Ext.B22. It is true that so far as the first tak of plaint B schedule is

concerned, the north south measurement is given as 1 > kole but DW5 has explained it as an error and a mistake for 21 > kole. I must also notice

that the extent of the property disposed of by Ext.B22 is mentioned in said document as ""40"" cents. A further fact to be noticed is that boundaries

given in Ext.B22 are of the entire 40 cents.

8. There is nothing in Ext.B22 to suggest that Kunhimoyi assigned only a portion of his property and retained the rest. Added to that, there is the

explanation given by DW5, the scribe of Ext.B22. Subsequent transaction, Ext.B23 entered by the 3rd defendant in favour of supplemental

defendants 15 and 16 followed by their executing Ext.B27 would also confirm the finding of the courts below. The said finding is one of fact

entered by the courts below on evidence and involves no substantial question of law.

9. The third defendant produced Exts.B2 to B5 series and Exts.B6 to B8 to show that he had sent the amount recited in Ext.B22 to be paid to the

persons concerned, by Demand Drafts (learned counsel submits that the amounts were sent after five years). Assuming that the said amount was

not paid, at any rate, on time, that does not invalidate Ext.B22, assignment deed and the remedy of persons concerned was to recover the amount

recited to be paid to them in Ext.B22.

10. I must also notice that though, Kunhimoyi died in the year, 1992 a demand for partition from the plaintiff comes only in the year, 2005 by

which time, the above property had already been assigned and the assignees have took possession and are enjoying the property. Had Kunhimoyi

left behind any property, it is unlikely that his legal heirs would not have demanded partition since 1992 till 2005. It is clear that the suit is

experimental and an attempt to take advantage of an error that occurred in stating the measurement of first tak in Ext.B22. In that view of the

matter, I do not find any subsequent question of law involved in this appeal which require decision.

Hence, this second appeal fails. It is dismissed.