

(1998) 01 KL CK 0034

High Court Of Kerala

Case No: A.S. No. 519 of 1989

Balakrishnan and Others

APPELLANT

Vs

P.V. Mohanan and Others

RESPONDENT

Date of Decision: Jan. 6, 1998

Acts Referred:

- Transfer of Property Act, 1882 - Section 100

Citation: AIR 1998 Ker 257

Hon'ble Judges: D. Sreedevi, J

Bench: Single Bench

Advocate: V. Sivaswamy and V.V. Ashokan, for the Appellant; V. Giri, for the Respondent

Final Decision: Allowed

Judgement

D. Sreedevi, J.

This appeal is filed against the decree and judgment in O. S. No. 212 of 1987 of the Additional Sub Court, North Parur. The suit is for declaration of the plaintiffs title over the plaint schedule property and also for a declaration that the decree and execution proceedings in O. S. No. 228 of 1980 are void and also for an injunction against realisation of the decree debt by sale of the plaint property in execution of the decree in O.S. No. 228 of 1980 and for damages. The plaintiff is the appellant.

2. The plaintiffs' case in brief is this : The plaint schedule property belongs to the plaintiffs and it is in their possession and enjoyment. The first defendant was the owner of the bus, KRE 4918. He sold the bus to the third defendant. For realisation of the sale consideration, the first defendant filed O.S. No. 228 of 1980 before the Sub Court against the third defendant and obtained an order of attachment before judgment. The third defendant approached the plaintiffs to stand surety and to get the bus released. The plaintiffs agreed to execute a security bond and accordingly a draft bond was furnished to the Court. The Court did not pass any order accepting the security bond. Thereafter defendants 1 and 3 colluded together and filed a

compromise petition on 23-1-1981, wherein it has been stated that the plaint amount, interest and costs can be realised from the property offered as security and accordingly, on the basis of the compromise, the suit was decreed creating a charge on the plaint property and the bus was released to the third defendant. The plaintiff in that case, who is the first defendant herein, filed E.P. for realisation of money charged on the plaint schedule property. Since defendants 1 and 3 have no right over the property and since the plaintiffs have not consented to the compromise petition, they filed the above suit for a declaration that the property belonging to the plaintiffs is not liable to be proceeded with for realisation of the decree debt in O.S. No. 228 of 1980. Therefore, the plaintiffs prayed for declaration that the execution proceedings are not binding on the plaintiffs and the plaint property.

3. The third defendant remained ex parte. Defendants 1 and 2 filed joint written statement contending that the suit is not maintainable as it is barred by law of limitation, that it is barred by section 47, CPC, that the execution Court overruled the objections of the plaintiffs, that the said order was confirmed in C.R.P. No. 344 of 1985 of this Court and that therefore plaintiffs are not entitled to question the compromise, and the decree passed thereon.

4. The trial Court after taking evidence dismissed the suit, holding that the suit is barred by res judicata by reason of the order in E.P. No. 207 of 1983 in O. S. No. 228 of 1980 and the copy of the order in C.R.P. No. 344 of 1985, they are respectively Exts. A5 and B3 and that the plaintiffs subjected to the jurisdiction of the execution Court. Aggrieved by the said decree and judgment, this appeal has been filed by the plaintiffs.

5. Admittedly, the first defendant in this case filed O.S. No. 228 of 1980 against the third defendant for realisation of money. Along with the plaint in that case, the first defendant filed an application for attachment before judgment of the bus KRE 4918 and obtained an order. The plaintiff in this case, at the request of the 3rd defendant offered the plaint schedule property as security for releasing the bus from the order of attachment. They have furnished a draft bond to the Court. There is absolutely no evidence to show that the said bond was accepted by the Court and that the bus was released to the plaintiffs. After the draft bond was furnished before Court, defendants 1 and 3 entered into a compromise, whereby the third defendant agreed with the first defendant to realise the amount charged on the plaint schedule property. The plaintiffs are not parties to the compromise petition. There is also nothing to show that the plaintiffs consented to the creation of a charge over the plaint schedule property. Admittedly, the bus was released to the third defendant. In the absence of any evidence to show that the security bond was accepted by the Court, it cannot be said that the plaint schedule property was accepted as security for realisation of the money. The plaintiffs offered the plaint schedule property as security, not for realisation of the amount due but for releasing the bus. Admittedly, the bus was not released to the plaintiffs. The learned

Sub Judge came to the conclusion, that the security was accepted by the Court and acted upon, this finding is against facts. Without the consent of the plaintiffs, defendants 1 and 3 cannot create a charge over the plaintiffs' property for realisation of the amount due. The compromise decree is binding only on defendants 1 and 3. From, the compromise petition, it can be seen that there is clear collusion between defendants 1 and 3. Therefore, the decree creating a charge over the plaint schedule property is not binding on the plaintiffs and as such the plaintiffs are entitled to get a decree declaring their right over the plaint schedule property. They are also entitled to get a declaration that the plaint property is not liable to be proceeded with in execution of the decree in O.S. No. 228 of 1980, to which he is not a party. The decree and judgment of the Court below are therefore perverse and hence they are liable to be set aside.

6. In the result, the appeal is allowed and the decree and judgment of the Court below are set aside and the suit is decreed in favour of the plaintiffs granting declaration and injunction as prayed for. The plaintiffs are allowed to draw the amount deposited by them in O.S. No. 228 of 1980. No costs.