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2023/KER/60145

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 5TH DAY OF OCTOBER 2023 / 13TH ASWINA, 1945

RSA NO. 250 OF 2020

AGAINST THE JUDGMENT AND DECREE DATED 21.12.2019 IN A.S.NO.7/2019 OF SUB COURT, MUVATTUPUZHA

AGAINST THE JUDGMENT AND DECREE DATED 15.10.2018 IN O.S.NO.539/2015 OF MUNSIFF COURT,MUVATTUPUZHA

APPELLANTS/RESPONDENTS 2 TO 4/DEFENDANTS 2 TO 4:

1 FATHIMA BEEVI
AGED 71 YEARS
W/O.MUHAMMED HUSSAIN RAWTHER, RESIDING AT THEMPILLIKUDIYIL HOUSE, VADAKEN MARADY KARA, MARADY VILLAGE, MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT.

2 AYISHA BEEVI,
AGED 64 YEARS
W/O.HUSSAIN KUNJU RAWTHER, RESIDING AT CHARIPURATHUPUTHENPURAYIL HOUSE, RAMANGALAM MARADY VILLAGE, MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT.

3 MYMOONA BEEVI,
AGED 62 YEARS
W/O.SIDHIQUE, RESIDING AT FAIZAL MANZIL, RANDAR KARA, MUVATTUPUZHA VILLAGE, MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT.

BY ADVS.
T.A.UNNIKRISHNAN
SRI.K.K.AKHIL

RESPONDENT/APPELLANT/PLAINTIFF:

ABDUL RAHMAN
AGED 60 YEARS
S/O.HUSSAIN SAIDUMUHAMMED RAWTHER, CHENATTU HOUSE, RAMANGALAM KARA, MARADY VILLAGE, MUVATTUPUZHA TALUK, ERNAKULAM DISTRICT-686673.

BY ADVS.

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SRI.T.P.PRADEEP
SRI.S.SREEDEV

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21.09.2023, THE COURT ON 5.10.2023 DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 5th day of October, 2023

Defendants 2 to 4 in O.S.No.539/2015 on the files of the Munsiff Court, Muvattupuzha, who are the respondents 2 to 4 in A.S.No.7/2019 on the files of the Sub Court, Muvattupuzha, have filed this appeal under Section 100 r/w Order XLII Rule 1 of the Code of Civil Procedure (for short, 'the C.P.C.' hereinafter), challenging the decree and judgment passed in the appeal. Sole respondent is the plaintiff in the suit.

2. Heard the learned counsel for the appellants as well as the learned counsel for the respondent.

3. I shall refer the parties in this appeal as 'plaintiff' and 'defendants' for convenience.

4. This Court admitted this appeal, as per order, dated 16.3.2020, by raising the following questions of law:

> *"(a) Is not the finding of the lower appellate court that Ext.B1 deed is executed for no valid consideration is legally incorrect?*
> *(b) Ext.B1 being a registered deed, can it be ignored without setting aside the document?"*

5. Plaintiff's case in brief:

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According to the plaintiff, the plaint schedule property, having an extent of 81 sq.m. in Sy.No.378/23A and 2.28 Ares in Sy.No.378/21/2 of Marady Village, originally belonged to Mr.Hussain Saidumuhammed Rawther, who is the father of the plaintiff and defendants 2 to 4. The 1st defendant is the wife of the above said Hussain Saidumuhammed Rawther. The case of the plaintiff before the trial court was that, since Hussain Saidumuhammed Rawther died *intestate,* the plaint schedule property, as such, is liable to be partitioned and the plaintiff is entitled to get 14/40 share, the 1st defendant is entitled to get 5/40 share and defendants 2 to 4 are entitled to get 7/40 share each.

6. Defendants' case in nutshell:

Defendants 1 to 4 filed joint written statement and admitted that the property originally belonged to Hussain Saidumuhammed Rawther, as per the sale deed of the year 1953. According to the defendants, the entire property is not partible, since during the life time of Hussain Saidumuhammed Rawther, he had executed sale deed No.6583/1994 of Muvattupuzha SRO and thereby, transferred 2.83 Ares of property in favour of the 3rd defendant and her

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husband, for a total consideration of Rs.12,000/- (Rupees Twelve Thousand only), excluding 26 sq.mt of property. The partible nature of the said property is to be proved by the plaintiff.

7. After raising necessary issues, the trial court recorded evidence. PW1 was examined and Exts.A1 to A3 were marked on the side of the plaintiff. DWs 1 and 2 were examined and Exts.B1 to B3 were marked on the side of defendants. Exts.C1 and C1(a) also were marked. On appreciation of evidence, the learned Munsiff found that, 26 sq.m. of property, comprised in Sy.No.378/21/2 covered by Ext.A1 sale deed i.e., sale deed No.3030/1953 of Muvattupuzha SRO, is partible and accordingly, preliminary decree for partition was passed as under:

> *"1. 26 sq.mtrs of property comprised in sy.No.378/21/2 left after 2.2 Ares of property as per Ext. B1 out of the plaint schedule property shall be partible by metes and bounds into 5 equal shares.*
>
> *2. Plaintiff is entitled to 2/5 shares in the above said property and defendants 2 to 4 are entitled to 1/5 shares each therein.*
>
> *3. The share of the plaintiff if found available shall be separated and considering the meager extent*

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of the property available for partition and the assignment as per Ext. B1, it shall be open to the parties to apply for auction of the partible property among them as per the provisions of the Partition Act.

4. *If the property is found otherwise partible into metes and bounds, the share of the 3rd defendant shall be allotted adjacent to the property obtained by 3rd defendant and her husband as per Ext. B1 document.*
5. *Costs of the suit shall be come out of estate.*

Suit is adjourned sine die. Either the plaintiff or the defendants on payment of court fee, may apply for passing of the final decree."

8. It is discernible that the trial court allotted shares, as hereinabove, excluding Ext.B1, the sale deed, relied on by the 3rd defendant and her husband. Allotment of shares also re arraigned because of the death of the 1st defendant during pendency of the suit.

9. The plaintiff filed appeal before the Sub Court, Muvattupuzha, vide A.S.No.7/2019. As per judgment, dated 21.12.2019, the learned Sub Judge allowed the appeal and reversed decree and judgment of the lower court.

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Accordingly, the preliminary decree of partition was passed in the appeal as under:

> *"Plaint schedule property is partible and is to be divided into equal shares by metes and bounds.*
> *Plaintiff is entitled to get 2/5 share and defendants 2 to 4 are entitled to get 1/5 share each in the plaint schedule property.*
> *Cost of the suit shall be comes out of estate.*
> *Suit adjourned sine die. Either the plaintiff or the defendants may apply for passing final decree on payment of prescribed court fee."*

10. Now, defendants 2 to 4 are in appeal against the said finding.

11. In fact, the substantial question of law in precise form arises herein is, whether the appellate court went wrong in rejecting Ext.B1 sale deed, though the same is a pucca sale deed executed for valid consideration? On a bare reading of the recitals in Ext.B1, it could be gathered that the same was executed in the year 1994, at the time of marriage of the 3rd defendant and the same was, in fact, for a consideration of Rs.12,000/- (Rupees Twelve Thousand only). It is in this context, the learned Munsiff found that, only 26 sq.m. of property, comprised in Sy.No.378/21/2, covered by

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Ext.A1 deed, excluding the property covered by Ext.B1 alone, as partible. But, the learned appellate judge found that, '*on a close reading of Ext.B1, it could be seen that the consideration of the document is numerous and the consideration also was passed by adjusting amount received prior to that*. *Therefore, Ext.B1 is liable to be ignored'*, is the finding of the appellate court. The appellate court is of the opinion that, since the plaintiff is not a party to Ext.B1, the plaintiff could very well ignore the document. The appellate court relied on a ruling of this Court in **Sankaran** v. **Velukutty** reported in **[1986 KHC 196] : [1986 KLT 794]** in support of the said finding.

12. I have perused the judgment relied on by the appellate court in **Sankaran**'s case (supra). In the said judgment, the question considered was, whether in a suit for partition and separate possession, court fee needs to be paid for the prayer for declaration that a settlement deed is invalid and not binding on the plaintiff or the plaint schedule properties. In the said decision, the learned counsel for the revision petitioner therein relied on decision in **Y.G.Gurukul** v. **Y.Subrahmanyam** reported in **[AIR 1957 AP 955]**, to

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contend that, '*when a person is not eo nomine a party to a suit or a document, it is unnecessary for him to have the deed or the decree annulled, and he can proceed on the assumption that there was no such document or decree.*' But, in the case dealt by this Court, the plaintiff sought for a declaration that, the document is invalid and not binding on him and it was observed that eventhough there is prayer for declaration that the settlement deed 1889/64 of the Mundoor Registry Office is invalid and not binding on the plaintiff or the plaint schedule properties, the plaintiff could not be called upon to pay court fees under Section 25(d)(i) of the Court Fees Act. It was observed further that, a plaintiff is not a party to the document, it is unnecessary for him to have the same annulled and the same could very well be ignored. But the above decision does not lay down a proposition that in the case of a sale deed, a party could very well ignore the sale deed and seek the relief of partition without seeking a declaration either to set aside it or to treat the document as non-est and not one binding upon him and the property, covered by the sale deed.

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13. In decision in **Suhrid Singh @ Sardool Singh** v. **Randhir Singh and Others**, reported in **[2010 KHC 4216]**, the Apex Court considered the question as to payment of court fee when the prayer is one for declaration that the deeds do not bind the plaintiff or his right on the plaint schedule property and it was held that, where the executant of a deed wanted to annul a deed, he had to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he had to seek a declaration that the deed is invalid or non-est or illegal or that it is not binding on him. The following explanation also was given by the Apex Court to make the position more vivid and the same is as under:

> *"The difference between a prayer for cancellation and declaration in regard to a deed of transfer / conveyance, can be brought out by the following illustration relating to 'A' and 'B' two brothers. 'A' executes a sale deed in favour of 'C'. Subsequently 'A' wants to avoid the sale. A has to sue for cancellation of the deed. On the other hand, if 'B, who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by 'A is invalid / void and nonest / illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non binding. But the form*

> *is different and court fee is also different. If 'A', the executant of the deed, seeks cancellation of the deed, he has to pay advalorem court fee on the consideration stated in the sale deed. If 'B', who is a non executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs 19.50 under Art 17(iii) of Second Schedule of the Act. But if 'B', a non executant, is not in possession and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an advalorem court fee as provided under S. 7(iv)(c) of the Act. S.7(iv)(c) provides that in suits for a declaratory decree with consequential relief the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of S7.*

It was held further in paragraph No. 9 as under:

> *“9. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "coparcenery and for joint possession. The*

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> *plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under S.7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds."*

14. Thus, the legal position emerges is that, when there is a sale deed, if the executant wanted to annul the same, he had to seek cancellation of the said deed or the relief to set aside the deed. If a non-executant seeks annulment of a deed, he had to seek a declaration that the deed is invalid, or *non-est* or, illegal or that the deed is not binding upon him. In this matter, the plaintiff not sought the relief to declare Ext.B1 as invalid, or *non-est* or, illegal or that the deed is not binding upon him. In fact, the plaintiff could not succeed without seeking such a relief and getting the said relief allowed.

15. In this matter, defendants 1 to 4 jointly filed written statement and they put up a case that, Ext.B1 sale deed was executed in favour of the 3rd defendant and her husband at the time of marriage for a total consideration of Rs.12,000/- (Rupees Twelve Thousand only). If so, whether the plaintiff is

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a party to the document or not, Ext.B1 is to be held as a validly executed sale deed and by the operation of said deed, the 3rd defendant and her husband perfected title to the property covered by Ext.B1. Since the plaintiff failed to seek the declaration as hereinabove referred and failure on the part of the plead and prove that Ext.B1 is invalid, or *non-est* or, illegal or that the deed is not binding upon him goes to the root of the matter. Therefore, it appears that the learned Sub Judge failed to appreciate the evidence and also to consider the legality of Ext.B1 document, whereby, the 3rd defendant and her husband perfected title. In order to disbelieve the pucca sale deed executed for valid consideration, there must be specific challenge and the document either to be set aside or to declare the same as invalid, or *non-est* or, illegal or that the deed is not binding upon the party who claims right in the property in exclusion of the sale deed, since the same is not a void document. Therefore, it has to be held that, the appellate court went wrong in reversing the preliminary decree of partition passed by the trial court and therefore, the judgment and decree passed by the appellate court stand set aside, by confirming

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the decree passed by the trial court with a modification as under:

16. In the result, this appeal stands allowed and the decree and judgment of the appellate court in A.S.No.7/2019, dated 21.12.2019, stand set aside. Consequently, the decree and judgment passed by the trial court, dated 15.10.2018, stand restored with a modification that, if any property remains, excluding property, having an extent of 81 sq.mt. in Sy.No.378/23A and 2.28 Ares in Sy.No.378/21/2 of Marady Village, as detailed in Ext.B1, the same alone is partible and the shares of the parties are in terms of the preliminary decree passed by the trial court.

The matter stands adjourned *sine die* and the parties are at liberty to proceed with the final decree application, in accordance with law, if any property in excess of one covered by Ext.B1 is physically available for partition.

Sd/-
A. BADHARUDEEN
JUDGE

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