

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE THOMAS P.JOSEPH

WEDNESDAY, THE 31ST AUGUST 2011 / 9TH BHADRA 1933

OP(C).No. 1704 of 2011(O)

OS.771/1997 of PRL.MUNSIFF COURT, CHERTHALA
.....

PETITIONER (S):

PHALGUNAN,S/O.NARAYANAN,SOORYAVANDANAM,
ERAMALLOOR MURI, EZHUPUNNA VILLAGE, CHERTHALA
TALUK.

BY ADV. SRI.ROY CHACKO

RESPONDENT(S):

ALEX,S/O.ABRAHAM,THATTARUPARAMBIL
NEW DAIL,EZHUPUNNA,THEKKUM MURI,KODAMTHURUTH
VILLAGE,CHERTHALA TALUK-688524.

ADV. SRI.JOHN JOSEPH VETTIKAD
SRI.C.JOSEPH JOHNY

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON
ON 31/08/2011, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1 -TRUE COPY OF THE PLAINT IN OS 771/97

EXT.P2 TRUE COPY OF THE WRITTEN STATEMENT FILED BY THE PETITIONER IN OS NO.771/97 OF MUNSIF COURT, CHERTHALA

EXT.P3 TRUE COPY OF THE IA NO.2810/99 IN OS NO.771/97 OF MUNSIF COURT, CHERTHALA

EXT.P4 TRUE COPY OF IA NO.2811/99 IN OS 771/97 OF MUNSIF COURT, CHERTHALA

EXT.P5 TRUE COPY OF ORDER DATED 27.11.1999 IN IA NO.2811/99 IN OS 771/97 OF MUNSIF COURT, CHERTHALA

EXT.P6 TRUE COPY OF JUDGMENT IN CRL.RP NO.1726/2004

EXT.P7 TRUE COPY OF THE ORDER IN IA NO.3148/2000 IN OS 771/97 OF MUNSIF COURT, CHERTHALA

EXT.P8 TRUE COPY OF THE PETITION DATED 8.9.2009

EXT.P9 TRUE COPY OF THE ORDER DATED 30.09.2009

EXT.P10 TRUE COPY OF THE PETITION FOR REVIEW FILED AS IA NO.4461/2009 IN OS 771/97 OF MUNSIF COURT, CHERTHALA

EXT.P11 TRUE COPY OF THE APPLICATION FOR CONDONATION OF DELAY FILED AS IA NO.4460/2009 IN OS 771/97 OF MUNSIF COURT, CHERTHALA

EXT.P12 TRUE COPY OF THE DEPOSITION OF ADVOCATE JOJI K.ANTONY IN IA NO.4460/2009

EXT.P13 TRUE COPY OF THE DEPOSITION OF PETITIONER IN IA NO.4460/2009

EXT.P14 TRUE COPY OF ORDER PASSED BY THE COURT BELOW IN IA 4460/2009 DATED 28.2.2011

EXT.P15 TRUE COPY OF THE ORDER PASSED ON IA NO.4461/2009

//TRUE COPY//

THOMAS P. JOSEPH, J.

O.P.(C) No.1704 of 2011

Dated this the 31st day of August, 2011.

JUDGMENT

Petitioner is the defendant in O.S.No.771 of 1997 of the court of learned Principal Munsiff, Cherthala. That is a suit for specific performance of an agreement for sale in respect of nine cents in survey No.240/6 filed by the respondent on the strength of the agreement (allegedly) executed by petitioner undertaking to convey the property for a total consideration of ₹20,000/- and receiving ₹5,000/- by way of advance. Respondent filed the suit since according to him, petitioner failed to discharge his obligations in terms of the agreement. Petitioner resisted the suit contending that there was no such agreement for sale and that in connection with a loan transaction certain signed blank papers were obtained from him which were misused. The case came up in the list for trial on 19.03.1999. On that day due to absence of petitioner and counsel there was an exparte decree in favour of the respondent directing petitioner to receive the balance sale consideration and execute the sale deed. Petitioner filed Exts.P3 and P4, I.A.Nos.2810 and 2811 of 2009 to set aside the exparte decree and to condone the delay of 141 days in filing the said application claiming that after filing of the suit he had shifted residence and the letter sent to him by his counsel in the previous address did not reach him. That application was resisted by the respondent. On 27.11.2009, as seen from Exts.P5, the said applications were dismissed as not pressed on the representation made by

counsel for petitioner. In the meantime, petitioner had transferred the property in favour of another persons who filed O.S.No.1006 of 2001 against petitioner and respondent for a declaration of title and injunction. That suit was dismissed. I am told that A.S.No.57 of 2006 arising from that dismissal is pending decision. In the meantime respondent had filed a complaint against petitioner under Section 138 of the Negotiable Instruments Act (for short, "the NI Act"), according to the respondent in respect of a different transaction petitioner had with a partnership firm of which respondent was the managing partner. That ended in the conviction of petitioner which ultimately came to this Court in CrI.R.P.No.1726 of 2004. This Court did not interfere with the conviction but, modified the sentence as per order dated 27.09.2005. While so, respondent filed an application under Section 28(3) of the Specific Reliefs Act (for short, "the Act") for execution of the sale deed. That petition was objected by petitioner. Respondent filed I.A.No.831 of 2002 to remove the obstruction and, that was allowed. Next, it was the turn of petitioner. He filed I.A.No.831(a) of 2002, it was allowed and the order on I.A.No.831 of 2002 was set aside. Respondent challenged the said order in C.M.A.No.6 of 2004 with an application to condone the delay. The application to condone the delay was dismissed and consequently the C.M.Appeal also was dismissed. Respondent challenged that order and judgment in W.P.(C) No.4661 of 2007. This Court allowed the Writ Petition and the matter was remitted to the first appellate court for decision on the application to condone the delay and the C.M.Appeal. Later, the trial court allowed I.A.No.3148 of 2000 filed by the respondent and ordered delivery of property on 14.10.2009. Petitioner filed Ext.P8, application under Secs. 27 and

28 of the Act which was dismissed by Ext.P9, dated 30.09.2009. In the meantime, petitioner filed I.A.Nos.4461 and 4460 of 2009 (Exts.P10 and P11) to review Ext.P5, order passed on Exts.P3 and P4, applications (to set aside the exparte decree and to condone the delay). Those applications were resisted by the respondent. Petitioner adduced evidence on the said applications. Trial court dismissed the said applications by Exts.P14 and P15, orders which are under challenge in this Original Petition.

2. Learned counsel for petitioner contends that the evidence on record will show that it was without obtaining any written instruction from petitioner that counsel submitted on Exts.P3 and P4, applications that the said applications are not pressed. Learned counsel has referred to me the evidence of petitioner and his counsel. It is also pointed out by the learned counsel that in fact, the amount involved in O.S.No.771 of 1997 was the subject matter of the criminal prosecution under Sec.138 of the NI Act and the order of this Court in CrI.R.P.No.1726 of 2004 also would justify that contention. In these circumstances it is prayed that Exts.P14 and P15, orders may be set aside and the matter may be remitted to the trial court to decide Exts.P3 and P4, applications afresh.

3. Learned counsel for respondent has contended that there is absolutely no merit in the contentions raised by the petitioner. It is contended by the learned counsel that the proceeding under Sec.138 of the NI Act has nothing to do with the transaction referred to in O.S.No.771 of 1997. According to the learned counsel, the plaint transaction is personal between petitioner

and the respondent while criminal prosecution was in respect of certain amount borrowed by the petitioner from a partnership firm of which respondent was the managing partner. It is also pointed out by learned counsel that it was because petitioner had undertaken to execute the sale deed as per the exparte decree in O.S.No.771 of 1997 that counsel for petitioner reported in court that Exts.P3 and P4, applications are not pressed. Learned counsel has invited my attention to Ext.R1(a), receipt dated 30.03.1999 allegedly issued by the petitioner in favour of the respondent. In response it is contended by learned counsel for petitioner that the said receipt also had been fabricated on the signed blank paper obtained by respondent.

4. Now I am concerned with the question whether Exts.P14 and P15, orders require interference. I must bear in mind that the exparte decree was passed on 19.03.1999 and that application to set aside that decree was filed after 141 days, on 21.08.1999. Exts.P3 and P4, applications were dismissed as withdrawn by Ext.P5, order dated 27.11.1999. Exts.P10 and P11, applications for review of Ext.P5, order are filed in the year 2009, ie. almost ten years after Ext.P5, order. It is not as if petitioner was unaware of Ext.P5, order for, thereafter several proceedings took place between the parties, both sides filing several petitions in the very same suit. Therefore, it is not as if petitioner was unaware of Ext.P5, order dated 27.11.1999 so that, he could file Exts.P10 and P11, applications only in the year, 2009.

5. I do not also find any substance in the contention that the suit transaction is connected with the transaction which culminated in the criminal prosecution and which ultimately ended as per order dated 27.09.2005 in

CrI.R.P.No.1726 of 2004. Paragraph 4 of Ext.P6, order shows that a contention was raised that the cheque transaction is connected with the alleged borrowel of amount as pleaded by petitioner in O.S.No.771 of 1997. Certain documents were also pressed into service in support of that contention. This Court observed that petitioner produced Exts.D1 and D2, judgment in O.S.No.771 of 1997 and Exts.P4 and P5, receipts. This Court observed that as rightly found by courts below Exts.D1 to D5 do not show that the suit or transaction of the suit was in respect of the amount borrowed by petitioner under Ext.P6, application for loan (which culminated in the criminal transaction). Learned counsel for petitioner has tried to take shelter under an observation made by this Court in Ext.P6, order that “so also the payment evidenced by Exhibits D4 and D5 are in respect of the amount claimed in the suit”. But, that does not indicate that the suit transaction and the criminal prosecution are in respect of the same transaction . Moreover, it is also observed in Ext.P6, order that the payment (ie. referring to Exts.D4 and D5) will not discharge the liability created under Ext.P1, cheque. Thus it is obvious that this Court did not accept the argument of petitioner that criminal prosecution was in respect of the loan transaction he pleaded in defence of the plaint in O.S.No.771 of 1997.

6. Learned counsel has taken me through the evidence of petitioner and his counsel recorded on EXts.P10 and P11, applications. The counsel in his evidence has stuck to his stand that on getting instruction from the petitioner he reported that Exts.P3 and P4, applications are not pressed though he did not get any endorsement from the petitioner to that effect. Merely because the counsel did not get an endorsement from the party in writing, it does not mean that it

was without instruction that the counsel has reported that Exts.P3 and P4, applications are not pressed. True that petitioner asserted in his evidence that he had not given any such instruction. But, I do not find reason to disbelieve the evidence of counsel that he reported that Exts.P3 and P4, applications are not pressed on the instruction of the party concerned (petitioner). Though it is disputed that Ext.R1(a) is executed by the petitioner, the said document also states that after the exparte decree petitioner got back the original documents from the respondent to facilitate execution of the sale deed in favour of the respondent.

7. At any rate I am not inclined to think that it is necessary at this distant point of time to reopen the case (O.S.No.771 of 1997). I must bear in mind that the criminal prosecution ended by Ext.P6, order dated 27.09.2005. Still petitioner did not think of asking for a review of Ext.P5, order and waited for another four years to move Exts.P10 and P11, applications. It is unlikely that if the counsel had withdrawn Exts.P3 and P4, applications without instruction, petitioner would have waited for such a long period to seek review by Exts.P10 and P11, applications. I do not find reason to interfere with the impugned order.

Resultantly this Original Petition fails. It is dismissed.

THOMAS P.JOSEPH,
Judge.

cks