

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 19TH DAY OF MAY 2022 / 29TH VAISAKHA, 1944

OP(C) NO. 2004 OF 2018

AGAINST THE ORDER DATED 20.06.2018 IN E.P.NO.76/2016 IN OS 6/2016 OF
MUNSIFF COURT, VAIKOM

PETITIONER/JUDGMENT DEBTOR:

BINOY KURIAN,
AGED 43 YEARS, S/O.KURIAN, KOLLAPPARAMBIL HOUSE, VELLASSERI
KARA, KADUTHURUTHY VILLAGE, KADUTHURUTHY P.O., VAIKOM
TALUK, PIN-686602.

BY ADVS.
SRI.BOBBYMATHEW KOOTHATTUKULAM
SMT.GIA MATHAI KANDATHIL

RESPONDENT/DECREE HOLDER:

VARKEY JOSEPH
AGED 67 YEARS, S/O.JOSEPH, MUNDAKKAL PUTHANPURAYIL HOUSE,
MANNAR KARA, KADUTHURUTHY VILLAGE, APPANCHIRA P.O., VAIKOM
TALUK, PIN-686604.

BY ADV JACOB E SIMON

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 06.04.2022, THE
COURT ON 19.05.2022 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 19TH DAY OF MAY 2022 / 29TH VAISAKHA, 1944

OP(C) NO. 1755 OF 2019

AGAINST THE ORDER DATED 3.1.2018 IN E.P.NO.76/2016 IN OS

6/2016 OF MUNSIFF COURT, VAIKOM

PETITIONER/DECREE HOLDER/PLAINTIFF:

VARKY JOSEPH
AGED 67 YEARS
S/O.JOSEPH, RESIDING AT MUNDAKKAL PUTHENPURAYIL
HOUSE, KADUTHURUTHY VILLAGE, APPANCHARA.P.O.,
VAIKOM TALUK, KOTTAYAM DISTRICT, PIN-686604.

BY ADV K.M.FIROZ

RESPONDENT/JUDGMENT DEBTOR/DEFENDANT & THIRD PARTY:

- 1 BINOY KURIAN,
AGED 43 YEARS
S/O.KURIAN, KOLLAPPARAMBIL HOUSE, VELLASSERI KARA,
KADUTHURUTHY VILLAGE, KADUTHURUTHY.P.O.,
VAIKOM TALUK, PIN-686604.
- 2 UNION BANK OF INDIA,
REPRESENTED BY THE REGIONAL MANAGER, REGIONAL
OFFICE ZAC COMPLEX, KODIMATHA, KOTTAYAM, KERALA,
PIN-686013.

BY ADV SRI.BOBMY MATHEW KOOHATTUKULAM

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 19.05.2022
ALONG WITH OP(CIVIL) NO.2004/2018, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

“C.R”

A. BADHARUDEEN, J.

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O.P(C). No.2004 of 2018
and
O.P(C).No.1755 of 2019

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Dated this the 19th day of May, 2022

J U D G M E N T

O.P(C).No.2004/2018 is one filed under Article 227 of the Constitution of India by the judgment debtor in E.P.No.76/2016 in O.S.No.6/2016 on the file of Munsiff Court, Vaikom, challenging order dated 20.06.2018, which is produced as Ext.P11. As per Ext.P11, the learned Munsiff accepted the sale proposed by the decree holder after exempting 7 cent out of 14 cent. The decree holder is the respondent in this Original Petition.

2. Whereas the decree holder has filed O.P(C).No.1755/2019, arraying the judgment debtor as respondent, challenging Ext.P4 order dated 3.1.2018, whereby the learned Munsiff exempted 2.67 Ares of property from sale under Section

60(1)(c) of the Code of Civil Procedure, holding that the said portion is the residential house of the judgment debtor and the land appertenant thereto which was liable to be excluded from the sale since he is an Agriculturist. The judgment debtor is the respondent in this Original Petition.

3. I shall refer the parties in this Original Petition as the 'decree holder' and the 'judgment debtor' for easy reference.

4. Heard the learned counsel for both sides in detail.

5. 3 relevant questions arise for consideration herein, as under:

(i) Whether exemption provided under Section 60(1) (c) of the Code of Civil Procedure is applicable to a property, where there is a statutory charge?

(ii) Whether exemption under Section 60(1)(c) of C.P.C is available to a property covered by a charge decree?

(ii) Whether in view of Ext.P11 order in O.P(C).No.2004/2018, the judgment debtor is estopped

from challenging Ext.P4 order in O.P(C).No.1755/2019 whereby the learned Munsiff granted exemption under Section 60 (1) (c) of the Code of Civil Procedure?

6. I shall refer the impugned order in O.P(C).No.1755/2019 as 'Ext.P4' and the impugned order in O.P(C).No.2004/2018 as 'Ext.P11' hereinafter for convenience.

7. While challenging Ext.P4, the learned counsel for the decree holder would submit that Ext.P4 order is erroneous and the judgment debtor is not entitled to get any exemption in this case where the decree was for getting back advance purchase money, where a statutory charge under Section 55(6)(b) of Transfer of Property Act was created. In this connection, the learned counsel had given heavy reliance on a Division Bench ruling of this Court reported in [2019(3) KHC 646 : 2019(3) KLT 147], *Ammini v. K.V.Vibeesh & Ors.* In the said judgment, the Division Bench observed that a judgment debtor, who suffers a money decree, if creates a charge over his property, cannot claim benefit under Section 60(1)(c) of the Code of Civil Procedure. Here, as rightly

argued by the learned counsel for the judgment debtor, no charge is created in the property as per the decree. However, it is not in dispute that the decree was the outcome of a claim for advance purchase money paid for the property proposed to be sold on the basis of a sale agreement entered into between the decree holder and the judgment debtor. Therefore, a statutory charge under Section 55(6)(b) of the Transfer of Property Act is there.

8. Going by the ratio in *Ammini's case (supra)* it is settled that when there is a charge decree over a property, during execution, the benefit of exemption under Section 60(1)(c) of C.P.C cannot be applied. Now the question is whether, a decree, where there is a statutory charge is akin to a charge decree so as to exclude the said property out of the purview of Section 60(1)(c) of C.P.C.

9. The learned counsel for the judgment debtor, though attempted to carve out exemption in between a charge decree and a property where statutory charge is created, he could not justify his contention based on convincing materials by highlighting statutory provisions. Thus, without much ado, it can be held that a charge

decree is akin to a decree where there is a statutory charge over the property.

10. It is also argued by the learned counsel for the judgment debtor that since the decree holder accepted Ext.P4 order, the same has become final and is merged with Ext.P11 order. So, the decree holder is estopped from disputing Ext.P4 order after conceding the same. He has placed reliance on the following decisions reported in [1953 KHC 308], *Mohanlal Goenka v. Benoy Krishna Mukherjee & Ors.*; [2010 KHC 4697], *Mumbai International Airport Pvt. Ltd. v. M/s.Golden Chariot Airport & anr.*; [2013 KHC 4116], *Rajasthan State Industrial Development Appellants and Investment Corporation & anr. v. Diamond and Gem Development Corporation Ltd. & anr.* And [2013(1) KHC 470], *Lekshmy Sukesini Devi & anr. v. L.Sumathy & anr.*, in support of this contention. How far this contention would help the judgment debtor, is the relevant and pertinent question.

11. In *Mohanlal Goenka v. Benoy Krishna Mukherjee & Ors.* (*supra*), the Apex Court held that principles of *res judicata*

would apply in execution proceedings as well and even an erroneous decision on a question of law operates as *res judicata* between the same parties to it. Here the contention of the learned counsel for the judgment debtor is that since after passing Ext.P4, no challenge raised by the decree holder against Ext.P4 and therefore, in view of Ext.P11, the challenge against Ext.P4 is barred by the *res judicata*. In fact, the submission cannot be appreciated. Here there is specific challenge against Ext.P4 and therefore, either *res judicata* or the principle of *estoppel* shall not be available in the case on hand.

12. The decision in *Mumbai International Airport Pvt. Ltd. v. M/s. Golden Chariot Airport & anr. (supra)*, has given emphasis to contend that a litigant cannot be permitted to assume inconsistent positions to the detriment of his opponent. The decision in *Rajasthan State Industrial Development Appellants and Investment Corporation & anr. v. Diamond and Gem Development Corporation Ltd. & anr. (supra)*, has been pointed out to contend that nobody could approbate and reprobate. Though

this legal position is correct, the facts of the case involved herein do not show that the decree holder took inconsistent positions in this case or taken approbate and reprobate contention. Therefore, the ratio of the above rulings has also no application to the facts of this case.

13. Coming to Ext.P4, the same is challenged by filing O.P(C).No.1755/2019 since the same alleged to be patently illegal. On perusal of Ext.P4 order, exemption in relation to 2.67 Ares of property, out of 5.67 Ares of property was given by the execution court resorting to Section 60(1)(c) of C.P.C. It is true that there is observation in Ext.P4 that in order to satisfy the decree, whole property need not be sold out. However, the order was passed by the execution court giving emphasis to Section 60(1)(c) of C.P.C ignoring the statutory charge and, therefore, the said order is patently illegal. When there is patent illegal order and is put under challenge, it cannot be said that the same is merged with a subsequent order passed by the court, that too, when the subsequent order is put under challenge by the judgment debtor also.

Therefore, I am not inclined to accept this contention.

14. The learned counsel for the judgment debtor highlighted decisions reported in [1996 KHC 66], *Parvathy Antherjanam v. Indian Bank*; [2008 (1) KHC 258], *P.K.Kuruvilla v. Corporation Bank*; and [2022 (2) KHC 479], *Fathima Beevi v. Joly John*, to contend that only property to an extent of 2 cent is sufficient to satisfy the decree since the total sale consideration agreed at the time of executing the sale agreement was Rs.50 lakh. Therefore, Rs.8,60,000/- fixed by the execution court as upset price is too low to 5.67 Ares of property and the same cannot be justified.

15. Repelling this contention, the learned counsel for the decree holder submitted that the upset price was fixed after assessing its present market value, and the agreement entered into between the parties cannot have predominance over the market price prevailing. He also submitted that considering the particular nature of the property, the entire extent of 5.67 Ares is liable to be sold to execute the decree, since execution of any portion is not possible.

16. Having appraised these contentions, the legal position is not in dispute that it is necessary to sell only the portion of the property which is necessary for satisfaction of the decree and a duty is cast upon the court under Order 21 Rule 64 of C.P.C to ensure the said compliance. In this matter it is discernible that the crux of the dispute is confined in the matter of grant of exemption in so far as 2.67 Ares of property and the residential house, out of 5.67 Ares, under Section 60(1)(c) of the Code of Civil Procedure. Similarly, after having exempted 2.67 Ares as per Ext.P4 order, then also, more extent got included in the sale proclamation which led to Ext.P11 order.

17. Coming to the crucial issue in these cases, it is relevant to note that the decree put in execution is for realisation of the advance sale consideration paid by the decree holder, where a statutory charge was created under Section 55 (6) (b) of the Transfer of Property Act. When there is a charge decree, a debtor cannot claim exemption under Section 60(1)(c) of the C.P.C. This legal position was considered by a Division Bench of this Court in the decision *Ammini v. K.V.Vibeesh & Ors.* (*supra*) and held in the

affirmative. In fact, there is no reason to differentiate a charge decree and a decree, where statutory charge is created, while considering exemption provided under Section 60(1)(c) of C.P.C. Thus, without much ado, it can be held that a decree where there is a statutory charge over the property is akin to a charge decree. **Therefore, it has to be held that the exemption provided under Section 60(1)(c) of the C.P.C is not applicable to a charge decree or to a decree where there is a statutory charge, over the property.** In view of the matter, I have no hesitation to hold that Ext.P4 order passed by the execution court is legally unsustainable and the same is liable to be set aside.

18. Coming to Ext.P11 order, the same also is confined to sale of only a portion of the property in view of exemption granted under Ext.P4, excluding the property and the residential house. On perusing Ext.P11, there is finding by the executing court that the extent of property covered by Ext.P11 is sufficient to satisfy the decree.

19. This finding in Ext.P11 would go to show that the

execution court diligently entered into a finding under Order 21 Rule 64 of C.P.C. Therefore, Ext.P11 order need not be interfered.

20. Accordingly, Ext.P4 under challenge stands set aside; Ext.P11 order stands confirmed and the execution court is directed to proceed further against the property covered by Ext.P11 order, to realise the decree debt in accordance with law. It is specifically ordered that if sale of the portion of the property covered by Ext.P11 order is not sufficient to realise the decree debt, the execution court can include more property or the whole property for sale, after appraising the fact that the decree debt could not be realised by selling the property covered by Ext.P11.

21. Considering the fact that the Suit is of the year 2016, the execution court is directed to expedite the execution, at any rate, within six weeks from the date of receipt of a copy of this judgment.

Accordingly, O.P(C).No.2004/2018 stands dismissed; O.P(C).No.1755/2019 stands allowed as indicated herein above.

Sd/- (A. BADHARUDEEN, JUDGE)

rtr/

APPENDIX OF OP(C) 2004/2018

PETITIONER'S EXHIBITS

- EXHIBIT P1 TRUE COPY OF THE EXECUTION PETITION, E.P. NO.76/2016 FIELD BY THE RESPONDENT/DECREE HOLDER, DATED 30/9/2016.
- EXHIBIT P2 TRUE COPY OF THE DRAFT SALE PROCLAMATION WITH SCHEDULE PROPERTY, DATED 24/5/2017.
- EXHIBIT P3 TRUE COPY OF THE OBJECTION TO EXT.P2 FILED BY THE PETITIONER, DATED 4/8/2017
- EXHIBIT P4 TRUE COPY OF THE ORDER PASSED BY THE MUNSIFF COURT, DATED 3/1/2018.
- EXHIBIT P5 TRUE COPY OF THE FRESH SCHEDULE FIELD BY THE RESPONDENT, DATED 29/1/2018.
- EXHIBIT P6 TRUE COPY OF THE OBJECTION TO EXT.P5 FILED BY THE PETITIONER DATED 16/3/2018
- EXHIBIT P7 TRUE COPY OF THE DRAFT SCHEDULE OF PROPERTIES FIELD BY THE PETITIONER, DATED 31/3/2018.
- EXHIBIT P8 TRUE COPY OF THE OBJECTION DATED 23/5/2018 FIELD BY THE PETITIONER TO EXT.P7
- EXHIBIT P9 TRUE COPY OF THE TITLE DEED OF THE PETITIONER BEARING NO. 2600/2010 DATED 24/2/2010
- EXHIBIT P10 TRUE COPY OF THE PETITION FIELD BY THE PETITIONER TO APPOINT AN ADVOCATE COMMISSIONER WITH SURVEYOR DATED 21/3/2018.
- EXHIBIT P11 TRUE COPY OF THE ORDER PASSED BY THE MUNSIFF COURT DATED 20/6/2018.
- EXHIBIT P12 TRUE COPY OF THE NOTICE FOR SALE DATED 30-06-2018

APPENDIX OF OP (C) 1755/2019

PETITIONER'S EXHIBITS

- EXHIBIT P1 A TRUE COPY OF THE EXECUTION PETITION
NO.76 OF 2016 IN O.S.NO.6 OF 2016 OF THE
MUNSIFF COURT VAIKOM DATED 25.5.2017.
- EXHIBIT P2 A TRUE COPY OF THE DRAFT SALE
PROCLAMATION DATED 25.4.2017 FILED BY THE
PETITIONER HEREIN IN E.P.NO.76 OF 2016 IN
O.S.NO.6 OF 2016 OF THE MUNSIFF COURT
VAIKOM.
- EXHIBIT P3 A TRUE COPY OF THE COUNTER AFFIDAVIT
FILED BY THE RESPONDENT/JUDGMENT DEBTOR
IN E.P.NO.76 OF 2016 IN OS.NO.6 OF 2016
OF THE MUNSIFF COURT VAIKOM.
- EXHIBIT P4 A TRUE COPY OF THE ORDER DATED 3.1.2018
IN EXECUTION PETITION NO.76 OF 2016 IN
O.S.NO.6 OF 2016 OF THE MUNSIFF COURT
VAIKOM.