

**IN THE COURT OF THE MUNSIFF, ATTINGAL
PRESENT: SRI. SANTHOSH KUMAR.N, MUNSIFF
MONDAY 14th NOVEMBER 2022/ 23rd KARTHIKA, 1944
EA 71/2021 IN EP 37/2020 IN OS 262/2018**

Petitioner :-

Rajeev, S/o Sathyadas Achari, aged 50 years, Nellivila Veedu,
Bhajanamadam, Nilakkamukku, Keezhattingal Village.

By Adv. Smt. Lali Sunil

Counter petitioner/ Decree Holder :-

Manoj, S/o Anirudhan, Sindhu Nilayam, Chathantemukku,
Bhajanamadam, Nilakkamukku, Perumkulam P.O, Keezhattingal
Village.

By Adv.Sri.A. Sabeer

This original suit having been finally heard on 27.09.2022 and the court on 14.11.2022 passed the following:

ORDER

Petition is filed u/o 21 Rule 97 and Section 151 of CPC.

2. The averments in the petition in brief are as follows:

The petitioner is the obstruction petitioner in the EP. Petitioner is not a party in the EP. Petition schedule property belonged to the father of the petitioner late Sri.Sathyadas who obtained it as per the 'G' schedule in the partition deed No. 3508/1957 dated 28.06.1957. The petition schedule property includes an old house wherein the petitioner and his siblings lived.

3. Raju Achary, one of the siblings of the petitioner caused the father

to execute a vexatious gift deed No.2190/1999 in his favour. Challenging the gift deed, sister of this petitioner and co-owner of the plaint schedule property instituted O.S.177/2018 before this court in order to set aside the gift deed and to effect metes and bound partition and separate possession of 1/6 share in the plaint schedule property on 12.04.2018. An ad-interim injunction was passed in I.A.852/2018. Notice was properly served on the respondent/ defendant in the IA. Notice was returned on 16.04.2018 with the endorsement, "respondent is in gulf". On 16.04.2018, the respondent executed a sale deed of the petition schedule property in favour of this decree holder knowing that a case was pending before this court. Suppressing the material facts, the decree holder herein filed O.S.262/2018 for evicting the judgment debtor and an ex parte injunction was also obtained. The IAs in both the suits were considered and passed order on 14.02.2019. CMA's was filed against the decree holder and court passed order against the decree holder restraining him from causing any hindrance to the peaceful residence of the appellant/ petitioner (JD herein) in the house. As the order in the CMA was against the decree holder, colluding with the 2nd defendant in O.S.177/2018 the decree holder settled the matter as per a compromise agreement and obtained a decree in O.S.262/2018. The judgment debtor received money from the 2nd defendant in O.S.177/2018 for

settling the matter.

4. 1st , 3rd, 4th and 5th defendants in O.S.177/2018 filed written statement and counterclaim. The 5th defendant in the meantime transposed as 2nd plaintiff in O.S.177/2018. The decree holder herein has also been impleaded as 6th defendant. The petitioner is residing in the plaint schedule property. The petitioner is entitled for 1/6 share in the plaint schedule property. The decree obtained in collusion was intended to defeat the right and interest of this petitioner and other sharers. Hence further proceedings in the EP be kept in abeyance till the disposal of the obstruction petition on merit.

5. **Respondent / decree holder filed objection contenting as follows:**

Petition is not maintainable either under law or on facts. The averments in the petition are denied. The obstruction petitioner suppressed material facts in the petition. The decree holder filed original suit for eviction, declaration of title and possession and for consequential injunction. Subsequently the parties compromised the matter and agreement was reached. Based on the agreement decree was passed on 1.10.2020. As per the agreement judgment debtor promised to vacate the petition schedule property from 15 days from passing the decree. However, judgment debtor

was reluctant to vacate and still residing there. Judgment debtor did not contest the EP and Amin was deputed to execute the decree. Due to the unlawful resistance from the side of the judgment debtor and her men Amin could not execute the order. Hence in order to defeat the decree holder, brother of the judgment debtor has come up with this petition. The petition is without bona fide.

6. The petition is filed in collusion with the judgment debtor in order to defeat the decree holder from enjoying the fruits of the decree. The judgment debtor has inducted third parties to delay the execution. The contention of the petitioner that he is residing in the house in the petition schedule property would show that judgment debtor has inducted the third parties. The obstruction petitioner never resided in the decree schedule property. He is residing V/12, Kanjiramvila veedu, Nagaroor desom, Nagaroor village. The decree holder has absolute title over decree schedule property and house building there in by virtue of sale deed No.459/2018 dated 16.04.2018 of SRO, Kadakkavoor. Except the decree holder nobody has right over the petition schedule property. During the pendency of the suit for eviction judgment debtor came forward and agreed to vacate the decree schedule property. The decree holder is a bona fide purchaser for consideration. Decree holder has verified the records pertaining title and

possession before purchasing the property. The vendor of the decree holder had absolute right over the property and it was free of encumbrance. Decree holder was not a party in O.S.177/2018. The petitioner has no locus standi to file this petition. Petition is devoid of merit and liable to be dismissed.

7. Based on the above averments points that arise for consideration

are:

1. Whether the EP is to be kept in abeyance till the disposal of O.S.177/2018 ?
2. Whether the petitioner is entitled for an order as prayed for ?
3. Reliefs and costs ?

8. Evidence in this case consists of testimony of PW1 and PW2. Ext.A1 to A5 were marked from the side of the petitioner and Ext.B1 and B2 from the side of the respondent.

9. Heard both sides.

10. **Point No.(1) & (2):** Obstruction petitioner is examined as PW1. He filed proof affidavit in lieu of examination in chief in tune with the contentions in the obstruction petition. PW1 deposed that the petition schedule property originally belonged to his father Sathyadas Achary as per the G schedule in the partition deed No.3508/1957. The property included

an old house wherein the petitioner and his siblings lived. Brother of the petitioner Raju Achary caused to execute a fabricated gift deed in his favour by the petitioner's father Sathyadas. Against the vexatious document, the petitioner and other siblings filed O.S.177/18 to set aside the gift deed No.2190/1999 and for metes and bounds partition of the decree schedule property and separate possession of her 1/6 share in the property. The petitioner and other siblings are also entitled for 1/6 share in the decree schedule property. PW1 further deposed that an ad-interim injunction was passed and that notice was returned with the endorsement that he left for Gulf on 16.04.2018. However, on the same day, his brother Raju transferred the property to the decree holder knowing that the suit for setting aside the gift deed and partition was filed in this court. PW1 further deposed that though I.A.437/2019 in CMA 13/2019 against the order in IA 1077/2018 in O.S.262/2018 was allowed restraining the decree holder herein from causing any hindrance to the peaceful residence of the appellant/defendant in O.S.262/2018, the judgment debtor colluding with Raju Achary made a compromise with the decree holder receiving money from his brother Raju Achary. Thus the decree in O.S.262/2018 was obtained in collusion in order to defeat right and interest of this obstruction petitioner and his other sisters who are the defendant No.1,3 and 4 in O.S.177/2018. The obstruction

petitioner is residing in the decree schedule property. He is entitled for 1/6 share . The decree is not binding on the obstruction petitioner and D1, D3 and D4 in O.S.177/2018. PW1 produced copy of B diary (A1) and copy of the counterclaim (A2) to prove that the decree was obtained in collusion.

11. Wife of PW1 is examined as PW2. PW2 also filed proof affidavit in tune with the contentions in the petition. PW2 deposed that she resides along with her children and PW1 in the decree schedule property. PW2 produced certified copy of the passport and copy of the driving license of PW1 in order to prove their occupation in the decree schedule property which are marked as Ext.A3 and A4 respectively. PW2 deposed that the decree in O.S.262/2018 was obtained in collusion and the decree holder purchased the decree schedule property knowing that O.S.177/2018 was pending with the court. PW2 further deposed that several attempts were made for evicting the witness and her family from the decree schedule property.

12. PW2 deposed that the judgment debtor left the decree schedule property when Amin came for executing the decree without any resistance. Judgment debtor received money from Raju Achary and thereby she did not press O.S.177/2018. PW2 deposed that decree holder owns only 2/6 share in the decree schedule property. PW2 deposed that judgment debtor even

after leaving the decree schedule property attempted to assault her and a complaint was lodged before the police. PW2 deposed that the assault was in accordance with the instruction of decree holder and Raju Achary. She produced copy of the FIR which is marked as Ext.A5.

13. Admittedly the decree schedule property belonged to the father of the obstruction petitioner who obtained it by virtue of the G schedule in the partition deed No.3508/1957 of SRO, Attingal. It is further admitted that the father of the obstruction petitioner executed a gift deed in favour of one of his siblings Raju Achary, in 1999. According to the obstruction petitioner, the gift deed is a false and fabricated document. Ext.A1 and A2 would show that the sister of the obstruction petitioner (JD herein) filed O.S.177/2018 for setting aside the alleged gift deed and for partition of the decree schedule property which is still pending. Ext.A1 would further show that the plaintiff therein (the JD herein) filed a memo not pressing the suit on 11.12.2020 and on the same date this obstruction petitioner, who was the 5th defendant in O.S.177/2018 was transposed as 2nd plaintiff. Records of this case would show that the decree in O.S.262/2018 was passed on 01.10.2020 upon a compromise filed by the decree holder and judgment debtor.

14. The obstruction petitioner admits that the decree holder has obtained only 2/6 share in the property and 4/6 share belong to the

obstruction petitioner and other siblings. At the bar the counsel for the obstruction petitioner submitted that the 4th defendant in O.S.177/2018 is also supporting the judgment debtor and 2nd defendant in O.S.177/2018. It is also evident from that the factum that counsel for D1 to D3 has no vakalath for D4 in O.S.177/2018. Though the obstruction petitioner claims that the decree schedule property is in the possession of D1, 3, 4 and 5, except D5, nobody has joined this petition. Though the suit for setting aside the gift deed and for partition of the decree schedule property and separate possession of 1/6 share of judgment debtor is pending, no evidence has been let in to prove that the gift deed was caused by vitiating elements.

15. Though the obstruction petitioner contended that the decree was obtained in collusion on receipt of money by the judgment debtor, there is no evidence to support the contention. In the cross examination, PW1 admitted that the decree schedule property presently in the ownership of the decree holder. He admitted that the decree holder obtained the property from his brother Raju Achary, PW1 deposed further that he came to know about the gift deed executed by his father in favour of Raju Achary only in 2018. However, he admitted that the gift deed was executed in the year 1999. He admitted that he took passport before his marriage. PW1 deposed that the address in his Adhar card is 'Kanjiramvila veedu, Nedumparambu

P.O, Nagaroor'. PW1 further admitted that the same is the address in the ration card. PW1 deposed that his address in the Adhar and ration card and residential address of his wife are same. Though he deposed that he had sold that house in 2010 immediately he changed his answer saying that he does not remember when did he alienate his house. PW1 deposed that he started living in 'Kanjiramvila house' in 2015. Witness immediately changed his answer saying that he doesn't remember it. PW1 deposed that he was abroad and therefore entrusted his sister (JD) to institute the suit. PW1 deposed that he owns a new house in the name of his wife just half kilometre away from the decree schedule property. He deposed that he does not remember when did he return to the house in the decree schedule property.

16. PW2 admitted in the cross examination that the decree schedule property is in the possession of decree holder. PW2 also admitted that PW1 herself and their children have Adhar cards and they have taken about ten years ago and their address in the Adhar cards is 'Kanjiramvila veedu, Nedumparambu P.O, Nagaroor. She admitted that the ration card was obtained in 2020 and the address in the ration card is also in the above address. PW2 deposed that her marriage with PW1 was in 2004 and the address in the birth certificate of the elder daughter who was born in 2008 is

'Nellivila veedu', but the address in the birth certificate of the younger son who was born in 2014 is Kanjiramvila veedu, Nedumparambu P.O, Nagaroor. PW2 admitted that the name of PW1 was removed from the ration card with the address in the decree schedule property years back. She admitted that the Ext.A4 driving license was issued in 2007 and Ext.A3 was obtained before their marriage. She admitted further that Ext.A5 was lodged upon the eviction proceedings begun by Amin. PW2 admitted that she obstructed the Amin from evicting her from the decree schedule property.

17. Though the obstruction petitioner claims that he is residing in the house in the decree schedule property and produced Ext.A3 and A4 to prove their occupation of the house in the decree schedule property. They are not sufficient to prove their occupation in the house in the decree schedule property as they are seen issued prior to 2017 in which year the decree holder obtained the property. It has brought on record that for more than 8 – 10 years, they have been residing in the address, 'Kanjiramvila house, Nedumparambu, Nagaroor. Though the address shown in Ext.A5 is that of the house in the decree schedule property, it is admitted that Ext.A5 was registered subsequent to the visit of Amin for eviction. The materials on record would show that the obstruction petitioner has no actual possession of the decree schedule property.

18. Since the O.S.177/2018 was filed before the institution of O.S.262/2018, this court can't insist the obstruction petitioner to prove the contention in O.S.177/2018 in this EP. It has come out in evidence that the decree holder has undisputed 3/6 share in the decree schedule property. Even when the right of the obstruction petitioner is found in the final adjudication of O.S.177/2018, it would only be 1/6 share. The other 2/6 share is alleged to belonged to the two other siblings of obstruction petitioner who are not parties to this petition. Fact being so, the right to be determined in O.S.177/2018 is only with respect to 3/6 share of the obstruction petitioner and D1 and D3 in O.S.177/2018. In the circumstance there is no bar in passing a conditional delivery of the decree schedule property to the decree holder on the condition that the delivery of the decree schedule property shall be absolute only after the adjudication of the right of the obstruction petitioner and others in the O.S.177/2018. In the light of the above discussion, point No.(1) and (2) are found against the obstruction petitioner.

19. **Point No.(3):** In the result, the obstruction petition is allowed and delivery is ordered as follows:

1. Delivery of the decree schedule property to the decree holder is ordered subject to the condition that the delivery shall be absolute only on

the determination of the right of the obstruction petitioner and others in O.S.177/2018.

2. Amin is directed to effect delivery by 29.11.2022 and for report 30.11.2022.

Dictated to the Confidential Assistant, transcribed and typed by her corrected and pronounced by me in open Court on this the 14th day of November, 2022.

Sd/-
SANTHOSH KUMAR.N,
MUNSIFF

Appendix:-

Exhibits marked for the petitioner:-

- A1- B Diary in OS 177/2018 of the Munsiff Court, Attingal.
- A2- Copy of Counter Claim.
- A3- Certified copy of passport
- A4- Certified copy of driving license.
- A5- FIR before the JFMC I Varkala

Exhibits marked for the Counter Petitioner:-

- B1- Copy of sale deed No. 459/01/2018
- B2- 02-05-2018 Copy of special power of Attorney

Court Exhibits- Nil

Witness for the petitioner:-

- PW1-17.03.2022- Rajeev
- PW2- 25-03-2022- Beena Rajeev

Witness for the Counter petitioner:- Nil

\\ Carbon copy//
Id/-
MUNSIFF

Typed by: Sofiya Beevi.
Compared by: sk

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