"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

&

THE HONOURABLE MRS. JUSTICE SHIRCY V.

FRIDAY, THE 21ST DAY OF JUNE 2019 / 31ST JYAISHTA, 1941

RFA.No. 360 of 2018

AGAINST THE ORDER DATED 16-08-2018 IN IA NO.282/2018 IN OS 11/2018 of SUB COURT,KOCHI

APPELLANTS/RESPONDENTS/PLAINTIFFS:

1 P.E. THOMAS,S/O EACEY, AGED 64 YEARS,
PAREMURI HOUSE, AROOR P.O., AROOR VILLAGE,
AROOR, ALAPPUZHA-688534.

2 S. SASANGAN,S/O. SIVARAMAN, AGED 52 YEARS,
X/1562, THAMARAPARAMBU, KOCHI P.O.,
FORT KOCHI VILLAGE, KOCHI-682501.

3 SUNNY L MALAYIL,S/O. M.J. LEWIS,
AGED 50 YEARS, XV/151 D,
CHESSY ROAD, MUNDAMVELI P.O.,
RAMESWARAM VILLAGE, KOCHI 682507

BY ADVS.
SRI.C.R.SYAMKUMAR
SMT.V.A.HARITHA
SRI.K.ARJUN VENUGOPAL
SRI.P.A.MOHAMMED SHAH
SRI.P.SREEKUMAR
SRI.R.NANDAGOPAL
SRI.SIDHARTH B PRASAD
SRI.SOORAJ T.ELENJICKAL
SMT.GAYATHRI MURALEEDHARAN

RESPONDENTS/PETITIONERS/DEFENDANTS:

1 MR.ABRAHAM JOSE ROCKY,
S/O ROCKY CHANDY NEROTH,AGED 33 YEARS,
NEROTH HOUSE, K.P. VALLON ROAD, KADAVANTHARA P.O., KADAVANTHARA DESOM, ELAMKULAM VILLAGE, KANAYANNUR TALUK, ERNAKULAM 682020

2 MRS.QUEENIE HALLEGUA @ QUEENIE SAMY HALLEGUA,
W/O. LATE SAMUEL HALLEGUA,AGED 82 YEARS,
RESIDING AT C.C. 6/197, SYNAGOGUE LANE,
MATTANCHERY P.O., RAMESWARAM EAST DESOM,
MATTANCHERY VILLAGE,
KOCHI TALUK, ERNAKULAM-682002.

3 MRS. JULIET HALLEGUA,
W/O. LATE JOSEPH HALLEGUA, AGED 83 YEARS,RESIDING AT C.C. 6/200, SYNAGOGUE LANE,
MATTANCHERY P.O., RAMESWARAM EAST DESOM,
MATTANCHERY VILLAGE, KOCHI TALUK, ERNAKULAM 682002

R1 BY ADV.SRI.K.P.SREEKUMAR
R2 & R3 BY ADV.DINESH MATHEW J.MURICKEN

THIS REGULAR FIRST APPEAL HAVING BEEN FINALLY HEARD ON 10.06.2019, THE COURT ON 21.06.2019 DELIVERED THE FOLLOWING:

"C.R."

A.HARIPRASAD & SHIRCY V., JJ.

R.F.A. No.360 of 2018

Dated this the 21st day of June, 2019

JUDGMENT

Hariprasad, J.

Paradesi Synagogue is the oldest active Synagogue located at Jew Town, Cochin (at present known as 'Kochi'). It was built in 1568 for catering the religious needs of Cochin Jewish Community in the erstwhile kingdom of Cochin. Admittedly, this Synagogue is a religious trust. The appellants herein, the plaintiffs before trial court, would contend that the plaint schedule land and building had been dedicated to the Synagogue and it therefore forms part of a religious charitable trust of a public nature. They would contend that an assignment deed obtained by the 1st respondent from respondents 2 and 3 (who are the defendants in the suit) in respect of the plaint schedule property is void and it has to be set aside. Court below, by the impugned order passed on an interlocutory application, upheld the plea of the respondents that the appellants have no cause of action against them for instituting the suit and therefore the plaint was rejected by invoking Order VII Rule

11(a) of the Code of Civil Procedure, 1908 (in short, "the Code"). That order is under challenge in this appeal.

2. Fundamental facts, relevant for a proper decision, are the following: Plaint schedule land and buildings thereon originally belonged to one Sassoon Hallegua @ Sassoon Mudaliyar who had obtained the same in a partition of the year 1124 M.E. While so, Sassoon Hallegua executed a registered Will bearing No.27 of 1966 of SRO, Kochi on 05.09.1966. He declared in the Will that the plaint schedule property, along with certain other items, be vested upon "Cochin Synagogue", also known as "Kochi White Jew Synagogue" after his death. It is also specifically set out in the Will that the properties described therein, set apart to the Cochin Synagogue, would have to be administered by a trust to be formed by the persons named in the Will and the income generated therefrom should be utilized for the specific purposes stated therein. Although a life interest was provided to his wife, it is specifically stated that after formation of the trust, the property would have to be taken over by the said trust from his wife. Sassoon Hallegua died on 07.09.1971 and thereupon his Will became operative. Later, his wife also died on 15.06.2015. According to the appellants, in terms of the Will executed by Sassoon Hallegua, the plaint schedule property became vested in the Cochin Synagogue and thereafter a trust was created on 30.03.2011 as per document No.96 of 2011 of SRO, Kochi, as decided by the testator, with a name

"Cochin Synagogue Trust" for the effective management and administration of the properties belonging to the Synagogue, including the plaint schedule property. Husband of the 3rd defendant, Joseph Hallegua was made the managing trustee by virtue of the position as kaikkaran/karanavan of the Cochin Synagogue. Accordingly, the plaint schedule property has become a property of the Cochin Synagogue by virtue of the provisions in the Will as well as in the deed of trust.

3. The appellants are tenants of various shoprooms in the building situated in the plaint schedule property. According to the appellants, apart from the tenancy right that they hold in respect of the property, they are also beneficiaries of the trust, going by the clear expressions in the trust deed. The deed of trust specifically spells out that creation of the trust is for preservation and maintenance of movable and immovable assets of the Cochin Synagogue, which includes the plaint schedule property as well. Although it is provided in the trust deed that the principal beneficiaries of the trust would be the jewish families living in Synagogue lane, Mattanchery, it is made clear that their children, grandchildren, great grandchildren, et.al. who live overseas in Israel, United States, Canada and other countries would also be defacto beneficiaries. It is further stated that benefits of the said trust would be made available to jewish visitors to India too. It has been specifically stated that non-jewish residents of Kerala and India and non-jewish visitors would also gain from the trust, since the Synagogue

and Jewish culture and heritage should be preserved for their benefit in the event that no Jewish person existed in Cochin at any given time. It is thus clear that the beneficiaries of the said trust are innumerable. The appellants therefore would contend that they are entitled to challenge the illegal alienation of the property effected by respondents 2 and 3 in favour of the 1st respondent.

4. It is seen from the records that the defendants, even before filing a written statement, filed an interlocutory application requesting the court below to reject the plaint as it, according to them, did not reveal any cause of action. Accepting the plea raised by the respondents, the court below, on finding that the 1st respondent did not take any step to evict the appellants from the tenanted buildings, took a view that the appellants are not entitled to file any suit, leave alone a suit of the present nature. Court below expressed a doubt as to whether a tenant has a right to approach a civil court for setting aside an assignment deed executed by his landlord in favour of a third person. It observed that the tenants cannot rush to court for the simple reason that the erstwhile landlord has executed an assignment deed in favour of a third person, when the assignee landlord has not taken any step to evict them.

5. Heard the learned counsel for the appellants and contesting respondents.

6. Learned counsel for the appellants contended that the

court below committed a grave error in finding that the plaint did not disclose a cause of action. According to him, the reasons stated for rejection of the plaint are illegal and opposed to the settled principles of law. As pointed out earlier, the court below rejected the plaint for the alleged non-disclosure of a cause of action on finding that the tenants have no right to initiate a legal action against the transferor and transferee landlords as long as there was no threat of eviction. This view, according to the learned counsel, is legally incorrect. Further, the plaint should not have been rejected at the threshold for the reasons mentioned by the lower court because, if at all, it can be held so only after a full-fledged trial.

7. Per contra, the learned counsel appearing for the 1st respondent contended that the trial court's reasons for rejecting the plaint are proper and legal and no interference is required. Besides, the trial court rightly invoked the principles in Section 116 of the Indian Evidence Act, 1872 (in short, “the Evidence Act”) to hold that the appellants, who are tenants under the respondents, shall not be permitted to deny, during continuance of the tenancy, the title of the landlord to the buildings in question. Learned counsel for the respondents also challenged the quantum of court fee paid in this appeal, contending that directions in Section 52 of the Kerala Court Fees and Suits Valuation Act, 1959 (in short, “the Court Fees Act”) have not been complied with.

8. Indisputable is the proposition that rejection of a plaint under Order VII Rule 11 of the Code is a deemed decree by virtue of the definition of "decree" in Section 2(2) of the Code. It cannot be denied that rejection of a plaint is reckoned or presumed to be a decree by a legal fiction. From the definition of decree, it will be clear that it is a formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. It is to be remembered that the rejection of plaint, under Order VII Rule 11 of the Code, need not be after a full-fledged trial under all circumstances. In otherwords, when a suit appears from the statements in the plaint to be barred by any law or where it is not filed in duplicate, the court has power to reject the plaint without actual trial. In such circumstances, no adjudication takes place. But for the deeming provision in Section 2(2) of the Code, rejection of plaint under the above circumstances would not have been a decree. Axiomatic is the principle that deeming a thing as another will be required only if both are legally and factually different entities. In fact, if both things are same or similar in all respects, no deeming is required. In the absence of any deeming provision in Section 2(2) of the Code, rejection of a plaint would not have been a decree capable of being challenged in appeal by invoking Section 96 and Order XLI of the Code. Although rejection of plaint is deemed to be a decree, it remains inexecutable.

9. Learned counsel for the appellants contended that the dispute raised by the respondents regarding insufficiency of court fee cannot hold good. According to him, even if the appellants succeed in the appeal, they will not get any tangible benefit, except getting a direction to the court below to try and dispose of the case on merits. It is therefore argued that the mandate of Section 52 of the Court Fees Act that fee payable in an appeal shall be the same as the fee that would be payable in the court of first instance on the subject matter of appeal shall not be applied to appeals filed against rejection of plaint.

10. A Division Bench of this Court had occasion to consider a similar question in **Beena K.G. v. M/s.Keshavam (2016 (3) KHC 677)**. Reckoning the fact that it would not be correct to lay down that rejection of a plaint is such a complete and final determination of the rights of parties, there is no room, in any appeal from such an order, for the proposition that the subject matter in the appeal is the same as subject matter of the original suit. After discussing the legal intricacies, the Bench held that in such cases the court fee payable in the appeal would fall under Schedule II Article 3(iii)(A)(1) of the Court Fees Act. We find no reason to differ from the view taken by this Court in **Beena**'s case. Hence the above contention of the respondents should fail.

11. The legal concept called “cause of action” is unquestionably a bundle of facts, which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant.

Certainly, it must take in an objectionable act on the part of the defendant, in the absence of which no cause of action can possibly accrue to the plaintiff. Unchallengeable is the proposition that cause of action is not limited to the actual infringement of the right sued on, but includes all the material facts on which it is founded. However, it does not comprise evidence necessary to prove such facts. Still, it takes in every fact enabling the plaintiff to obtain a decree. By cause of action, it is meant that every fact, which, if traversed, would be necessary for the plaintiff to prove in order to support his right to get a judgment from the court; in otherwords, a bundle of facts which itself is necessary for the plaintiff to prove in order to succeed in the suit.

12. Learned counsel for the respondents placed heavy reliance on **A.B.C. Laminart Pvt. Ltd. v. A.P.Agencies ((1989) 2 SCC 163)** to contend that the appellants, by their own showing in the plaint, have no cause of action, since there is no actual or attempted invasion of their rights. Placing reliance on **Smt.Patasibai and others v. Ratanlal (JT 1990 (3) SC 68),** the learned counsel contended that the trial court is justified in rejecting the plaint because even on the admitted facts appearing from the records, the appellants were unable to show that all or any of the averments in the plaint disclosed a cause of action giving rise to a triable issue. In such a situation, it is held by the Supreme Court in **Smt.Patasibai**'s case that rejection of plaint is proper.

13. Reliance is also placed on **Nesammal v. Edward (1999 AIHC 470)** by the learned counsel for the respondents to contend that provisions under Order VII Rule 11 of the Code are not exhaustive and court has inherent power to see that vexatious litigations are not allowed to take or consume time of the court. We are aware that such general propositions, settled by long line of binding precedents, are to be respected. But, if they are applicable herein is the question.

14. Learned counsel for the respondents cited **Raghwendra Sharan Singh v. Ram Prasanna Singh (AIR 2019 SC 1430)** to assert a proposition that merely because a plaint is cleverly drafted to appear to reveal a cause of action, the plaint should be rejected, if actually it does not have a cause of action on a consideration of the entire averments in it. Decision rendered by the Supreme Court in **Raghwendra Sharan Singh** was dealing with a case of rejection of a plaint under Order VII Rule 11(d) of the Code on the ground of limitation in a suit filed more than 22 years after the execution of a registered gift deed, praying for a declaration that the gift deed in favour of the defendant was a sham transaction and not binding on the plaintiff. The Supreme Court noticed that the plaintiff therein did not pray for any declaration or relief of setting aside the gift deed as in that case the suit would have been barred by limitation under Article 59 of the Limitation Act, 1963. In that context, the Supreme Court made the observations therein. Facts in the case on our hand are clearly different

from those dealt with in **Raghwendra Sharan Singh**'s case.

15. Learned counsel for the 1st respondent relied on **Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust ((2012) 8 SCC 706)** to contend that the principles regarding rejection of plaint stated therein should be applied to this case. We are afraid, there are striking differences in the facts in **Church of Christ Charitable Trust & Educational Charitable Society** and this case. The reasons mentioned by the Supreme Court in the facts of that case cannot be imported to this case to justify the rejection of plaint at the threshold.

16. We have mentioned in the foregone paragraphs about the import of the expression "cause of action". If we apply the legal principles regarding cause of action, deducible from binding precedents, to the facts borne out from the averments in the plaint read in its entirety, we are of the view that this is not a case where the trial court should have exercised its jurisdiction under Order VII Rule 11(a) of the Code to reject the plaint at its inception because most of the issues raised by the respondents in the interlocutory application filed for rejecting the plaint could be answered only after trial of the case.

17. Principle that a plaint can be rejected only on the basis of what is contained in the entire plaint, read as a whole, and not anything else, including the written statement is no more *res integra* (see **Mayar (H.K.) Ltd. and others v. Owners and Parties, Vessel M.V.Fortune**

Express and others (AIR 2006 SC 1828) and **Central Provident Fund Commissioner, New Delhi and others v. Lala J.R. Education Society and others ((2016 (14) SCC 679)**.

18. It is the case of the appellants in the plaint that they are not only tenants of the buildings belonging to a religious charitable trust, but also beneficiaries of the trust. Stated precisely, apart from their tenancy rights, whether they can be regarded as beneficiaries of the trust is a matter to be decided by letting in evidence in the case. Such issues cannot be pre-judged merely by looking into the plaint. To this extent, the court below has committed a serious mistake.

19. Another point canvassed before us is about the right of a tenant to challenge title of his landlord. As mentioned above, Section 116 of the Evidence Act is the relevant provision. The learned counsel for the appellants contended that the principles in Section 116 of the Evidence Act cannot be extended to a challenge against the rights devolved on the 1st respondent (assignee landlord) because the tenants are only estopped from disputing the title of their landlord at the time of induction. It is therefore contended that such a plea advanced on the side of the respondents cannot be legally countenanced.

20. On a careful reading of Section 116 of the Evidence Act, it will be clear that what is prohibited therein by a rule of estoppel is to the effect that a tenant shall not dispute title of his landlord at the time of induction. But, the provision does not preclude a tenant from

disputing the derivative title of a third party, who claims title on the basis of transfer from the inducting landlord. Our view is fortified by a pronouncement by the apex Court in **Subhash Chandra v. Mohammad Sharif (AIR 1990 SC 636)**. We shall quote the relevant observations:

> *"A tenant already in possession can challenge the plaintiff's claim of derivative title showing that the real owner is somebody else, but this is subject to the rule enunciated by S.116 of the Evidence Act. The section does not permit the tenant, during the continuance of the tenancy, to deny that his landlord had at the beginning of the tenancy a title to the property. The rule is not confined in its application to cases where the original landlord brings an action for eviction. A transferee from such a landlord also can claim the benefit, but that will be limited to the question of title of the original landlord at the time when the tenant was let in. So far claim of having derived a good title from the original landlord is concerned, the same does not come under the protection of the doctrine of estoppel, and is vulnerable to a challenge. The tenant is entitled to show that the plaintiff has not as a matter of fact secured a transfer from the original landlord or*

that the alleged transfer is ineffective for some other valid reason, which renders the transfer to be non-existent in the eye of law. ….."

21. In this case, it is contended by the learned counsel for respondents that the 3rd appellant (one of the tenants) had paid rent to the 1st respondent before the suit and his action, in a legal sense, can be considered as attornment. Therefore, Section 116 of the Evidence Act would apply at least in respect of the 3rd appellant. In answer to this contention, the learned counsel for the appellants relied on **Sambhunath Mitra and others v. Khaitan Consultant Ltd. and others (AIR 2005 Cal.281)**, wherein it has been held as follows:

"Secondly, it is now settled law that a tenant is estopped from disputing the title of his landlord at the time of induction but he is not precluded from disputing the derivative title of a third party who claims title on the basis of transfer from inducting landlord and even if, the tenant erroneously pays rent to such derivative title-holder, once it is proved that according to the law no title has really been conveyed in favour of such third party. (See Ketu Das v. Surendra Nath Sinha reported in 1903 (7) Cal WN 596 (DB); Chengtu Sarkar v. Jeheruddin Mondal and others reported in AIR 1926 Cal.720 (DB). The fact that the tenant due to ignorance of law, paid rent to such third

party will not stand as estoppel against the tenant from denying the derivative title of the third party and from re-tendering rent to the real landlord. Therefore, the plaintiffs cannot be prevented by the principles of estoppel from disputing the title of the third party even if they erroneously thought that the said third party acquired right to the property and consequently, paid rent. ….."

It is therefore clear that the suit cannot be said to be without a cause of action merely by relying on Section 116 of the Evidence Act.

22. It is argued by the learned counsel for the respondents that if the appellants wanted any relief against the respondents complaining of a breach of trust, their remedy should have been a suit under Section 92 of the Code. In answer to this contention, learned counsel replied that the appellants do not seek any of the reliefs enumerated in Section 92(1) (a) to (h) of the Code. Settled legal position is that any and every suit relating to a public trust need not be under Section 92 of the Code, unless the reliefs claimed therein do fall within the matters enumerated in Section 92(1) of the Code.

23. We may not be understood as pronouncing anything on the merits of the suit at this stage. Issues arising in the case are to be decided by the trial court at the appropriate stage of the proceedings based on evidence in the case. We do not want to pre-empt anything in favour of any of the parties to the litigation, as their rights are to be

decided at the end of a trial process. However, we are of the definite view that on a reading of the plaint in its entirety, the court below is not legally justified in entering a finding that the averments in the plaint do not reveal a cause of action. This finding is undoubtedly incorrect, which needs an interference.

In the result, the appeal is allowed. The impugned order passed by the court below is hereby set aside. The court below shall allow the parties to complete their pleadings and after framing issues the parties will go for trial of the case. All the questions - both legal and factual - arising in the suit shall be decided with regard to the evidence in the case and the legal principles applicable to the facts of the case. Parties shall appear before the court below on 08.07.2019.

All pending interlocutory applications will stand closed.

A.HARIPRASAD, JUDGE.

SHIRCY V., JUDGE.

cks