

HIGH COURT OF KERALA**Bench: Justice Anil K. Narendran and Justice P.G. Ajithkumar.****Date of Decision: 21 December 2023**

MAT.APPEAL NO. 254 OF 2022

APPELLANTS/RESPONDENTS 3 & 4:**1 DR. N VIJAYAN****2 RANI****VS****1 MAMITHA****2 VIJAYAN****3 ROY VIJAYAN**

MAT.APPEAL NO. 256 OF 2022

APPELLANTS/RESPONDENTS 3 TO 5:**1 DR. N. VIJAYAN****2 RANI****3 VIVEK VENUGOPAL****RESPONDENTS/PETITIONER/RESPONDENTS 1 & 2:****1 MAMITHA****2 RAJESH VIJAYAN****3 ROY VIJAYAN****Legislation:**

Section 19, 7 of the Family Courts Act, 1984

Section 25 of the Indian Partnership Act, 1932 ()

Section 53 of the Transfer of Property Act, 1882

Subject: Matrimonial dispute and financial claims arising from it, including issues related to the alleged misappropriation of gold ornaments, money, and the validity of a sale deed.

Headnotes:

Matrimonial Dispute - Challenge to the common order of the Family Court dated 23.12.2021 - Appeals filed under Section 19(1) of the Family Courts Act, 1984 - O.P.Nos.140 of 2012 and 2211 of 2012 decreed in favor of the petitioner - Appeals filed by respondents 3 & 4 (appellants in both appeals) - Special leave granted. [Para 1-4]

Partnership in Business - Dispute regarding the liability of respondents 3 and 4 (appellants) in the firm M/s Vijaya Realtors - Evidence presented by the petitioner, including oral testimony and documentary proof, to establish that funds given by her, her father, and brother were invested in the firm - Appellate court upholds the liability of the 4th respondent as a partner in the firm - The 3rd respondent found not to be a partner. [Para 16-18]

Gold Ornaments and Money - Allegation of misappropriation of 332 sovereigns of gold ornaments, Rs.10 lakhs as patrimony, and other sums - Extensive evidence presented, including oral testimony and documents, to prove the petitioner's claims - Court finds in favor of the petitioner on these claims. [Para 19-21]

Validity of Sale Deed - Challenge to the validity of Ext.B1 sale deed executed by the 3rd respondent in favor of the 5th respondent - Family Court holds Ext.B1 to be a sham document executed to defraud the petitioner - Appellate court overturns this decision, stating that the 3rd respondent was not a partner in the firm, and therefore, the sale deed cannot be challenged on these grounds. [Para 22-23]

Jurisdiction of Family Court - Dispute regarding the jurisdiction of the Family Court to entertain O.P.No.2211 of 2012 - Family Court had jurisdiction based on the nature of the dispute - Appellate court disagrees with this view but acknowledges that such a dispute does not arise in this case. [Para 23]

Disposition - Appeals allowed in part - Decree in O.P.No.140 of 2012 confirmed against respondents 1, 2, and 4, set aside against respondent 3 - Decree in O.P.No.2211 of 2012 set aside - Parties to bear their respective costs. [Para 24]

Referred Cases: None.

Representing Advocates:

Adv. S.V. Balakrishna Iyer represented the appellants/respondents 3 & 4 in both appeals.

Adv. P.B. Krishnan and Adv. Terry V. James appeared for the appellants in both appeals.

Adv. N.U. Harikrishna and Adv. Jagan Abraham M. Georgw represented respondent 1.

Adv. Jaison Antony represented respondent 3.

The judgment was delivered by Hon. Mr. Justice Anil K. Narendran and Hon. Mr. Justice P.G. Ajithkumar.

JUDGMENT

P.G.Ajithkumar, J.

The common order dated 23.12.2021 of the Family Court, Thrissur is under challenge in these appeals filed under Section 19(1) of the Family Courts Act, 1984. As per that common order O.P.Nos.140 of 2012 and 2211 of 2012 were decreed. Respondent Nos.3 and 4 in O.P.No.140 of 2012 and respondent Nos.3 to 5 in O.P.No.2211 of 2012 filed the respective appeals.

2. These appeals were admitted on 29.03.2022. As per the order in I.A.No.1 of 2022 in the respective appeals, operation of the impugned decrees was stayed subject to furnishing security.

3. The 1st appellant in these appeals expired on 17.09.2022. The memos filed by the learned counsel for the appellants that the legal

representatives of the deceased 1st appellant are already in the party array were recorded.

4. Heard the learned counsel for the appellants and the 1st respondent. Other respondents did not turn up.

5. O.P.No.140 of 2012 was filed by the 1st respondent wife claiming return of 332 sovereigns of gold ornaments or its value and realisation of Rs.10,00,000/- that was paid as patrimony. Rs.54.5 lakhs, which was allegedly paid to the respondents in the O.P. at various occasions and Rs.6,03,205/- towards the value of the car given to the husband at the time of marriage also were sought to be recovered. O.P.No.2211 of 2012 was filed by the 1st respondent seeking to declare Ext.P1 sale deed a sham one and to set aside it.

6. Wife (since divorced) has filed both the O.Ps. Respondents No. 1 to 4 are common in both O.Ps. The petitioner was married to the 1st respondent on 21.11.1999. The 2nd respondent is the brother, 3rd respondent is the father and 4th respondent is the sister of the 1st respondent. The 5th respondent in O.P.No.2211 of 2012 is the son of the 4th respondent. The parties are referred to hereafter as per their aforementioned ranks.

7. Initially both these O.Ps. were decreed by the Family Court and all the respondents were exparte at that time. Present appellants approached this Court challenging the said exparte decrees by filing O.P.(FC) Nos.64 of 2017 and 87 of 2017. Those Original Petitions were allowed by this Court and the decrees as against the present appellants alone were set aside. The matter was remitted for a fresh trial. By those judgments, the decree as against respondent Nos.1 and 2, who are the husband and his brother became final.

8. Contentions of the petitioner in O.P.No.140 of 2012 are: At the time of marriage she was given 350 sovereigns of gold ornaments, Rs.10 lakhs and a Hyundai Accent Car. On subsequent occasions, the petitioner and

her father and brother had to make several payments on the demand and request of the respondents. Respondents No.1 to 4 were the partners of M/s Vijaya Realtors, which was involved in construction business. In order to meet various business requirements of the said firm, the 1st respondent as also the other respondents demanded money on various occasions and the petitioner, her father and brother had to pay various amounts totalling Rs,54,50,000/- to them. Out of 350 sovereigns, 18 sovereigns of gold ornaments were retained by the petitioner for her day to day use. Remaining 332 sovereigns of gold ornaments were kept in the locker in the name of the petitioner and the 1st respondent. The 1st respondent pledged the said gold ornaments with financial institutions and the whole of the money received thereby was invested in the partnership business. The car was sold and sale proceeds was also invested in that business. The entire amount thus received from the petitioner, and her father and brother was utilised for the purpose of the partnership firm. Relationship between the petitioner and the 1st respondent strained and that resulted in filing O.P.Nos.140 and 141 of 2012. O.P.No.141 of 2012 was filed seeking divorce and the decree thereon has become final. In O.P.No.140 of 2012 immovable property in the name of the 3rd respondent was attached. When the 5th respondent filed a claim petition contending that he had purchased that property and it was not liable to be attached, the petitioner realised that such a fraudulent document was executed in favour of the 5th respondent. Ext.B1, sale deed No.3333 of 2009 of SRO, Chevayoor was executed in favour of the 5th respondent only to avoid the petitioner proceeding against the said property for realisation of amounts due to her. In such circumstances, the petitioner has filed O.P.No.2211 of 2012

9. After the remand, respondents No. 3 and 4 filed a detailed counter statement in O.P.No.140 of 2012. Respondent Nos.3 to 5 in O.P.No.2211 of 2012 also filed a counter statement. Their contentions are that they were not parties in receiving the gold ornaments, car or money from the

petitioner, his father or brother. The 3rd respondent is not a partner of M/s Vjaya Realtors. The 4th respondent was only a silent partner and never had she involved in the business of that partnership firm. They did not know whether gold ornaments were taken away or misappropriated by the 1st respondent. Similarly, they have no knowledge about receipt of any money by the 1st respondent. Thus, they denied liability in respect of the claims set forth by the petitioner.

10. As regards Ext.B1, the 5th respondent contended that he had purchased the said property by making payment of valid consideration of Rs.25 lakhs. The contention of the 3rd respondent was that on various occasions, he had received money from the 5th respondent totalling Rs.67 lakhs and in set off of Rs.25 lakhs from that amount, he had executed Ext.B1 in favour of the 5th respondent. He also contended that O.P.No.2211 of 2012 is not maintainable since the Family Court has no jurisdiction to entertain such a petition.

11. At the trial, PWs.1 to 4 were examined and Exts.A1 to A34 were marked on the side of the petitioner. RWs1 to 3 were examined and Ext.B1 to B13 were marked on the side of the respondents. Ext.X1 series were also marked through RW1, the Manager of the Punjab National Bank. The Family Court after considering the entire evidence and hearing both sides, held respondents No.3 and 4 to be the partners of M/s Vijaya Realtors. The Family Court further held that the petitioner succeeded in proving misappropriation of 332 sovereigns of gold ornaments, Rs.10 lakhs paid as patrimony, the sale price of the car and also Rs.54.5 lakhs for the business purposes of M/s Vijaya Realtors. Accordingly, O.P. No.140 of 2012 was decreed against respondents Nos.1 to 4.

12. The learned counsel appearing for respondents No. 3 to 5 would submit that there was total lack of evidence to hold the deceased 3rd respondent and the 4th respondent

liable for the alleged misappropriation of gold ornaments, car and money. It is submitted that the 1st respondent might have received the gold ornaments, car and money and used for the business of M/s Vijaya Realtors, but respondents No. 3 and 4 could not be held liable for that, and they have no role in the firm business. It was contended that the 3rd respondent was not a partner, and the 4th respondent was only a sleeping partner having no role in the business. The 4th respondent claimed that she has been residing along with her husband, who is a reputed businessman and she did not want to involve in any such business.

13. The decree in O.P.No.140 of 2012 as against respondents Nos.1 and 2 has become final and there cannot be any challenge to that part of the decree in O.P.No.140 of 2012. Therefore, the challenge confines to the legality and correctness of the decree in O.P.No.140 of 2012 as against respondents Nos.3 and 4 and the decree in O.P.No.2211 of 2012 as against respondent No.5. The specific plea of the petitioner to fasten respondents Nos.3 and 4 with liability is that they were also partners of M/s Vijaya Realtors. It is her contention that the whole money given by the petitioner, her father and brother, including the patrimony and the money received by pledging her 332 sovereigns of gold ornaments and sale of her car were invested in the firm business. If, respondents No. 3 and 4 are responsible as partners, particularly, respondent No. 3, question concerning validity of Ext.B1 sale deed in favour of respondent No.5 does crop up for consideration. In the said circumstances, the first question needs resolution is whether respondents No. 3 and 4 were partners of M/s Vijaya Realtors.

14. Deceased 3rd respondent denied having any role in the business of M/s Vijaya Realtors. While it was contended that the 3rd respondent was not a partner, the 4th respondent claimed that she was only a sleeping partner, having no role in the business of the partnership firm. The petitioner relied on not only the oral evidence, but documents such as

Exts.A16 and A18 also to prove the role of respondent Nos.3 and 4 in the partnership business. Ext.A16 is an e-mail communication where it has been stated that respondent No.3 was the head of M/s Vijaya Realtors. Ext.A18 is a copy of the review petition filed by the 2nd respondent before the Family Court,

Ernakulam. The recital in it shows that respondent Nos.3 and 4 were also partners of the firm. When the learned counsel for the petitioner relying on the said evidence submits that respondent Nos.3 and 4 are partners of M/s Vijaya Realtors, the learned counsel for respondent Nos. 3 to 5 (appellants) would urge that those items of evidence are inadmissible and insufficient to prove that fact. Further, the learned counsel for the appellants by placing reliance on a certified copy of the Register of Firms relating to M/s Vijaya Realtors would submit that respondent No.3 was never a partner of the said firm.

15. Respondent Nos.3 and 4 filed IA No.2 of 2023 under Order XLI, Rule 27 of the Code producing therewith a certified copy of the Register of Firms. It is the copy of the Register of Firms issued by the Registrar of Firms, Kerala. It is averred in the affidavit filed in support of the petition that the trial court unnecessarily cast burden on respondent Nos.3 and 4 to prove that the 3rd respondent is not a partner of the firm and that necessitated in producing the said document. It is a certified copy of a public document. No tenable contention to refuse permission to receive the said documents in evidence has been raised by the petitioner in the original petitions. Since the document as well as its contents are admissible without formal proof, it is received in evidence and marked as Ext.B14.

16. The petitioner has no case that the partnership firm was ever reconstituted. It is evident from Ext.B14 that as per the statement dated 28.07.1997 submitted before the Registrar of Firms there were four partners to M/s Vijaya Realtors and the deceased 3rd respondent was not a partner.

The 4th respondent is, however, a partner. As against the said document, the evidence available on the side of the petitioner to prove that the 3rd respondent was also a partner is the oral testimony of PW1 and Exts.A16 and A18. Ext.A16 is an e-mail communication wherein it has been stated that respondent No.3 was the head of M/s Vijaya Realtors. Ext.A18 is a copy of the review petition filed by the 2nd respondent before the Family Court, Ernakulam. The contents of Ext.A16 e-mail communication, which is not sent by the 3rd respondent, cannot bind him and cannot be used to prove that he was a partner. Similarly, the Review Petition was filed by the 2nd respondent and any assertion to the effect that the 3rd respondent was also a partner of the said firm cannot be an admission by the 3rd respondent. Of course, there could have some force to that assertion if no other evidence regarding that fact has come forth. Insofar as the fact as to who are the partners of a registered firm, the authentic document is the Register of the Firms. When Ext.B14 shows that the 3rd respondent was not a partner, the oral evidence of PW1 or Exts.A16 and A18 would not help the petitioner to prove that the 3rd respondent was a partner of M/s Vijaya Realtors. Therefore, the finding of the court below that the 3rd respondent was also a partner of the said firm is incorrect and liable to be reversed.

17. The 4th respondent is a partner as per Ext.B14. While deposing before the court as RW2, the 4th respondent admitted that fact. Her explanation is that she was a sleeping partner only and therefore she is not answerable to the liabilities of the firm. A partnership firm is a compendium of persons and the liability of its partners is co-extensive. As per Section 25 of the Indian Partnership Act, 1932, every partner is liable jointly and also severally for all the acts of the firm while he is a partner. The *ipse dixit* of RW2 that she was only a sleeping partner and has no responsibility to the acts of the firm cannot be accepted in the light of the said statutory provisions and

Ext.B14. Therefore, the 4th respondent has the responsibility to answer the liabilities of the firm.

18. PW1 is the petitioner. PW2 is her father and PW3 is her brother. They have deposed in detail regarding handing over of gold ornaments, car and money at various occasions. In order to prove one instance of payment of money, PW4 was examined. The contention of the petitioner is that her father had to pay an amount of Rs.18 lakhs to PW4 in repayment of such an amount advanced by him to the 1st respondent. Ext.A6 is the agreement entered into between PW2 with PW4 in that regard. PW4 deposed in court about that fact convincingly also. Apart from the oral testimony of these witnesses, the petitioner had produced several documents in order to establish that money was paid to the respondents on several occasions totalling Rs.54,50,000/-. One such instance of payment was from one Sri.Manikandan. Money was received from him on the assurance that an apartment in the complex proposed to be constructed by M/s Vijaya Realtors would be allocated to him. Ext.A7(a) and A7(b) are the receipts for the repayment at the petitioner's instance to

Sri.Manikantan when that contract fell through. After deliberating upon all such evidence in detail, the Family Court came to the conclusion that payment of Rs.54,50,000/- to the 1st respondent or the firm by either the petitioner or PWs.2 and 3, at her instance, has been sufficiently proved. Having gone through the oral testimony of PWs.1 to 4 and the relevant documents, we do not find any reason to depart from the said finding.

19. The oral testimony of PWs.1 to 3, Ext.A2 series photographs of the marriage between the petitioner and the 1st respondent and Ext.A3 series, the receipts showing the purchase of gold ornaments, were relied on by the Family Court to find that 350 sovereigns of gold ornaments was given to the petitioner at the time of marriage. RW2, the 4th respondent admitted during cross-examination that Ext.A2 series were the photographs during the

marriage. She also admitted that all the gold ornaments seen adorned by the bride were there at the time of her reaching the matrimonial home. The document issued from M/s Muthoot Finance, Ext.A3 shows that 330 sovereigns of gold ornaments were pledged by the 1st respondent. RW1 deposed before the court that the locker in the name of the petitioner and the 1st respondent was last opened by the 1st respondent. In the light of the said evidence, the Family Court found the contention of the petitioner that 332 sovereigns of gold ornaments was appropriated by the 1st respondent to be true. We find no reason to interfere with that finding for, it is supported by sufficient evidence.

20. As stated, the plea of the petitioner that besides the 1st respondent-husband, other respondents are liable for return of the money so paid or appropriated by pledging gold and sale of her car stems from the contention that all such money was spent for the firm business. It is not the contention of the petitioner that other respondents appropriated such money from her husband as her relatives and trustees. The question emerges therefore is whether such amounts were utilised for the business of the firm.

21. Respondent No.1, is the person at the instance of whom all such money was received or appropriated. He did not come forward to deny that all of such money was invested in the firm. While PWs.1 to 3 categorically deposed that whole of such money was used or invested for the business of the firm M/s Vijaya Realtors, the contrary evidence is the oral testimony of RW2. She is proved to be a partner of the firm, but she claimed that she had no role in the business of the firm. Her evidence cannot, therefore, be used to disbelieve the evidence tendered by the petitioner. The 1st respondent, the person having direct knowledge regarding the source of fund or nature of expenditure incurred by the said firm did not deny such assertions by the petitioner. Therefore, the view taken by the court below which was after considering and appreciating the entire evidence on record cannot be said to

be incorrect. It follows that the petitioner is entitled to realise the amounts received from her or at her instance and also realised by pledging of gold and sale of the car, not only from the 1st respondent, but also from the firm, M/s Vijaya Realtors. The challenge of respondent No.4 to the decree allowing the petitioner to realise the decree amount from the assets of respondent Nos.1, 2 and 4 cannot be interfered with. Respondent No.3 not being a partner of the firm, he or his assets are not answerable to such claims.

22. The above takes us to the question whether Ext.B1 is liable to be set aside on the plea of the petitioner. The basis for the plea that Ext.B1 is a sham document and liable to be set aside is that the 3rd respondent executed it in order to defraud and defeat her claim against the 3rd respondent as a partner of the firm. The 3rd respondent was proved to be not a partner of the firm, M/s Vijaya Realtors. So, it is not available for the petitioner to contend that alienation effected by him falls within the mischief of Section 53 of the Transfer of Property Act, 1882.

23. The contention of respondents 3 to 5 that the Family Court did not have jurisdiction to entertain O.P.No.2211 of 2012 was rejected by the court below holding that Ext.B1 was executed with a view to defeat the claim of the petitioner which arose from matrimonial relationship between herself and the 1st respondent. The Family Court took the view that the said dispute was one coming within the purview of Explanation (c) to Section 7 of the Family Courts Act. It is the definite contention of the petitioner that the disharmony cropped up in the marital relationship between the petitioner and the 1st respondent in 2008. PW1 deposed that she left the matrimonial home on 01.07.2008. Ext.B1 was executed by the 3rd respondent in favour of the 5th respondent on 05.11.2009. Pointing out that Ext.B1 was executed by the 3rd respondent in favour of his grandson much after the matrimonial discord between the petitioner and the 1st respondent, and the consideration for the sale was totally inadequate, held Ext. B1 to be a sham one. We found above

that the 3rd respondent was not a partner of the firm. So, the document executed by him cannot be called in question by the petitioner. Although the view taken by the Family Court regarding maintainability O.P.No.2211 of 2012 is legally correct, such a dispute does not germinate in this case. The decree of the Family Court in O.P.No.2211 of 2012 is therefore liable to be set aside.

24. In the result,-

- 1) Mat.Appeal No.254 of 2022 is allowed in part as follows:-
 - i) the decree in O.P.Nos.140 of 2012 as against respondents No. 1,2 and 4 is confirmed; and
 - ii) the decree in O.P.No.140 of 2012 as against respondent No.3 is set aside;
- 2) Mat.Appeal No.256 of 2022 is allowed and the decree in O.P.No. 2211 of 2012 is set aside.
- 3) Parties have to bear their respective costs.

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