

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

WEDNESDAY, THE 05TH DAY OF AUGUST 2020 / 14TH SRAVANA, 1942

MFA.No.47 OF 2020

ORDER IN OP 107/2019 DATED 17-12-2019 OF I ADDITIONAL DISTRICT
COURT, ERNAKULAM

APPELLANT/PETITIONER:

M.P.VARGHESE, AGED 73 YEARS
S/O. PATHROSE, MADAPPILLY HOUSE,
MALAYIDOMTHURUTHU PO, KIZHAKKAMBALAM
VILLAGE-683561.

BY ADVS. SRI.P.THOMAS GEEVERGHESE
SRI.TONY THOMAS (INCHIPARAMBIL)
SRI.E.S.FIROS

RESPONDENTS/RESPONDENTS:

- 1 ANNAMMA YACOB, AGED 66 YEARS,
W/O. YACOB, MATTAKKATTIL HOUSE,
VILANGU P O, KIZHAKKAMBALAM VILLAGE -682021.
- 2 M.P. GEORGE, AGED 62 YEARS, S/O. PATHROSE, MADAPPILLY
HOUSE, AMBUNADU, MALAYIDAMTHURUTHU P O,
KIZHAKKAMABALAM VILLAGE, 683561.

R1 BY ADV. SRI.SHIJU VARGHESE

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON
03.08.2020, THE COURT ON 05.08.2020 DELIVERED THE FOLLOWING:

JUDGMENT

Dated this the 5th day of August 2020

A very efficacious, substantive and procedural mechanism to facilitate the realisation of the deserving and intrinsic value of encumbered estates and other immovable properties - within the annals of the Transfer of Property Act, 1882 ('the TP Act' for short) - strangely appears very rarely to have been invoked in Courts, which impression is inevitable because the case law on it is scarce, if not, none.

2. The provision in reference is Section 57 of the TP Act, which enables any party to the sale of immovable property burdened by an encumbrance, to apply to Court for a declaration that the said property is freed from such encumbrance on deposit of sums to be adjudged by it; and for the issuance of an order of conveyance or vesting order, proper for giving effect to the sale.

3. The apparent fact that this Section, though in the TP Act for the past more than a century and quarter, has attracted little or no reported judgments anywhere in India, obligates me to examine it very closely and carefully from both its academic and practical ambit.

4. This Section of the TP Act is, with the exception of its last two sub sections, almost verbatim of Section 5 of the English Conveyancing

and Law of Property Act, 1881 ('the English Act' for short), which reads as below:

“5.-(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) This section applies to sales not completed at the commencement of this act, and to sales thereafter made.”

5. After adopting the afore Section of the English Act (which, subsequently, was replaced by Section 50 of the Law of Property Act, 1925 in England) with minor modifications like substituting the word 'land' with 'immovable property' or adding that the words 'in execution of a decree' along with sale by court or out of court and

such other, Section 57 of the TP Act, through sub-sections (d) and (e) thereof, enable an appeal from any declaration, order or directions issued by a Court thereunder, as if it were a decree and stipulates that 'Court' in this section means either a High Court in the exercise of its ordinary or extraordinary original civil jurisdiction; or the Court of a District Judge within the local limits of whose jurisdiction the property or any part thereof is situated; or any other Court which the State Government may, from time to time, by notification in the Official Gazette, declare to be competent to exercise the jurisdiction conferred by this section.

6. The purpose of Section 57 of the TP Act is unmistakable from its tenor that it is intended to assist any party to the sale of an immovable property, which is subject to an encumbrance, to fructify the sale for its fair value after receiving in deposit - for payment to the incumbrancer - the capitalised value of the periodical charge, or the capital sum charged on the property, together with incidental charges. It thus enables the parties to a sale to invoke the jurisdiction of the court for the purpose of fulfilling their contracts, notwithstanding the encumbrances on the property.

7. As I have already noticed above, since there are hardly any reported precedents touching this section and since it obtains its

parturition from the English Act, it would be apposite to see how the English Courts have dealt with it.

8. In **re Freme's Contract ((1895) 2 Ch.256)**, Kekewich, J spoke on the utility of the afore extracted Section 5 of the English Act thus:

“Until it came into force a purchaser was entitled to object that he did not get his estate in fee because there was a charge-it might be only an insignificant charge, such as a small legacy payable *in future*. He got off his bargain unless he and the vendor could arrange on some scheme of indemnity.”

9. Needless to say, no objection as afore noticed by Kekewich, J can now thwart the purchaser, since in the event of any such, it can be removed by resorting to the provisions here made.

10. Later, in **Wilberforce v. Wilberforce ((1915) 1 Ch 94)**, Sargant, J. spoke on the utility and purpose of the Section as:

“*Prima facie*, the object of the whole of S.5 is not to disturb any vested or other rights more than is necessary, but to enable a sale to be effected and the property to be transferred to the purchaser notwithstanding there may be on the land a liability for payment of a future sum which would, but for the provisions of the section, clearly have prevented the sale of the land free from incumbrance. Of course, a purchaser might think fit to take the land subject to the incumbrance, but the purchase of land subject to an incumbrance is not usually a desirable investment, and the object of the section was to enable the land to be conveyed to the purchaser so that he might get a full and complete title to it.”

11. Further, even though the term 'encumbrance' is not specifically defined in the TP Act, the English Act provides for it under Section 2(vii) as:

“Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof.”

12. Thus, moving on, the purposive relevance of Section 57 of the TP Act is accentuated by Section 2(d) of it, which declares that nothing contained in the Act will, *'save as provided by Section 57 and Chapter IV of this Act', effect 'any transfer by operation of law, or in execution of, a decree or order of a Court of Competent jurisdiction'*.

13. This assumes importance because Section 5 of the TP Act defines *'transfer of property'* to be *'an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself'*. Hence, even though *'transfer of property'* is defined to mean transfer *inter-vivos*, through Section 2(d) - which prevails on it - transfer by a court or under its orders are unequivocally protected. (Read for support **Laxmi Devi v. Mukund Kanwar and Others** (AIR 1965 SC 834)).

14. Now returning to Section 57 of the TP Act, it affirmatively provides that on application of a party to a sale, the court may, if it thinks fit, **direct or allow** payment into court. The impact of these words in the context of Section 5 of the English Act was dealt with in **Great Northern Railway Co. v. Sanderson** (25 Ch. D. 788) and

concluded that in the case of sales by court, it can 'direct' payment; and in the case of sales out of court, it can 'allow' payment.

15. As I have said supra, the TP Act adopts the spirit and soul of the English Act, with very minor lexical variations and Section 57 also provides that in the case of sale of immovable property subject to an encumbrance being sold by a court, or in execution of a decree, **or out of court**, any party to it can apply for a declaration that the said property is free of such; in which event, the appropriate court may **direct or allow** payment, sufficient to meet the encumbrance on the property, into court. There is thus no doubt that this section is intended to facilitate sale out of court, as much as it is for sale by a court or in execution of a decree.

16. In this context, a comparison of this section with Section 83 and Order XXXIV Rule 12 of the Code of Civil procedure would also be necessary. Section 83 of the Code of Civil Procedure makes provisions for the discharge of a mortgage on property after it has become due. This Section also provides for the declaration of an encumbered property, which is the subject matter of a sale, to be free of the encumbrance; however, with a cardinal difference that the court cannot compel the mortgagee to accept the deposit in discharge of the mortgage. As far as Order XXXIV Rule 12 of the CPC is

concerned, it provides that where any property subject to a prior mortgage is ordered to be sold, the court may, with the consent of the prior mortgagee direct that it be sold free from the mortgage, giving to the mortgagee the same interest in the proceeds of the sale as he had in the property sold.

17. Ineluctably, thus, Section 57 of the TP Act is wider in its amplitude than Section 83 or Order XXXIV Rule 12 of the CPC, since it permits the court to declare a property free of encumbrance even against the will of the encumbrancer and even in the case of sales not directed by Order XXXIV of the CPC.

18. That said, however, a note of caution in the exercise of power under Section 57 of the TP Act was voiced by the Hon'ble High Court of Madras in **Mallikarjuna Sastri v. Narasimha Rao** ((1901) ILR 24 Mad 412) to the effect that the section cannot be applied when it comes to a charge or encumbrance already adjudicated by a court and which has become part of a decree or even in a case of adjustment of a decree out of court. This certainly is the golden rule and must guide the minds of courts whenever the section is invoked by a party.

19. Now that the legal provisions have been so purveyed, I will set out the facts which obligates this Court to decide whether and

how it comes to pay in this case.

20. The appellant, who is the petitioner in O.P.No.107/2019 on the files of the I Additional District Court, Ernakulam, states that he and the respondents are siblings. He says that the properties of their late father were partitioned in the year 1980, through a partition deed, Document No.1873/1980 of the Puthencruz SRO ('Partition Deed' for short), whereby certain extents of it were allotted to him and to the second respondent, his brother. He says that the said Deed, however, contained a covenant that both he and his brother - the second respondent - must pay an amount of Rs.500/- each to their sister - the first respondent - within a year, failing which she has been allowed to recover it, for which purpose, the said amounts would stand charged on the respective properties.

21. The petitioner says that though the first respondent accepted Rs.500/- from the second respondent, she refused to do so when he offered her the same and therefore, that the property allotted to him under the Partition Deed is still burdened with this obligation. He says that this is more so because the stipulations in the Partition Deed make it incumbent on the first respondent to accept the amount of Rs.500/- and execute necessary receipt in his favour.

22. The petitioner submits that, in the meanwhile, so as to obtain resources for the marriage of his adopted daughter, he entered into an agreement for sale of the property obtained by him under the Partition Deed with a certain Sri.Muhammed Raphic N.P., but that on account of the charge of Rs.500/- on it, as explained above, he has been unable to execute the sale deed. He submits that in such circumstances, he had no other option but to approach the learned District Court, Ernakulam under Section 57 of the TP Act, volunteering to deposit the amount of Rs.500/- in favour of the first respondent, so as to obtain a declaration from the said court that the property is free of the said encumbrance.

23. The appellant submits that, however, on a misdirection as to the scope and amplitude of Section 57 of the TP Act, the District Court dismissed his application, through the impugned order, holding it to be not maintainable.

24. It is this order which is assailed by the appellant in this appeal.

25. When I noticed the afore singular facts on 15.07.2020, when this appeal was first considered, I had directed the first respondent, through the order of the said date, to file an affidavit stating if she is unwilling to accept the amount of Rs.500/- from the

appellant; and if so, why. The first respondent has, in obedience thereto, filed an affidavit dated 29.07.2020, averring that she is unwilling to accept the amount from the appellant since there are certain other personal issues between them and because it has not been offered by him within the time granted in the Partition Deed or even later; and further contending that his application under Section 57 of the TP Act is not maintainable.

26. I have heard Sri.P.Thomas Geeverghese, learned counsel for the appellant and Sri.Shiju Varghese, learned counsel for the first respondent.

27. Sri.P.Thomas Geeverghese, learned counsel for the appellant, set forth his arguments in line with the afore narrated factual matrix, contending that even in the case of a sale conducted out of court, the jurisdiction of the statutorily competent court can be invoked by any party to it. He submitted that this is manifest from the words 'or out of court' in sub-section (a) to Section 57 of the TP Act and thus asserted that the learned District Judge has erred in issuing the impugned order. He further predicated that since the sum charged on the appellant's property under the partition Deed is only Rs.500/- - it providing for no interest or other charges, even if it had not been paid within the period of one year stipulated therein - this

construes to be the capital sum charged on it and that hence that his client was wholly justified in invoking Section 57 of the TP Act, so as to fructify the sale of the property as per the agreement of sale entered by him with a certain Sri.Muhammed Raphic N.P., a copy of which has been produced before the District Court as Exhibit A5.

28. The learned counsel for the appellant thus prays that the impugned order be set aside and this Court permit his client to deposit the amount of Rs.500/- favouring the first respondent and declare that the property is now free of the said encumbrance; adding that it has been clearly averred by his client in the application before the District Court that the first respondent is actuated by confutative intentions, because she expects that if the appellant is some how incapacitated from selling the property, the same will be inherited by her after his life time, since he is unmarried and survived only an adopted daughter.

29. In response, Sri.Shiju Varghese, learned counsel for the first respondent, argued that Section 57 of the TP Act cannot be invoked except in the case of sale of immovable property through court and that in other instances, the appellant ought to have filed a regular suit. He further submitted that his client and the appellant have deep seated disputes between them and that the former is not

willing to accept Rs.500/- from the latter in such circumstances. He then added that since the amount has now become a charge on the property - it not having been paid within the time stipulated in the Partition Deed - the appellant must discharge it in the manner as prescribed in Chapter IV of the TP Act and not through the mechanism under Section 57 of it.

30. However, in the same breath, Sri.Shiju Varghese admitted that the Partition Deed only charges the property to the sum of Rs.500/- and nothing more and further that the second respondent, who is his client's other brother, has already paid her a like sum, for which she has issued a receipt to him. On a pointed question from this Court, he further conceded that his client has no case that the Partition Deed is void or ineffective on account of the failure of the appellant to tender his share of Rs.500/-; but that because of the personal rift between them, she is not willing to execute a discharge or receipt in his favour. He submits that all this has been stated by his client in the affidavit dated 29.07.2020, filed by her in response to the order of this court dated 15.07.2020; further pointing out that she takes great umbrage to the uncharitable allegation of the appellant that she is expecting to inherit the property after his life time. He thus prays that this appeal be dismissed.

31. From the facts afore noticed and the submissions of the learned counsel, it is perspicuous that there is no dispute between the parties that an amount of Rs.500/- alone is charged on the property of the appellant, as per the Partition Deed, in favour of the first respondent. The specific covenant of the said Deed, which is extracted under makes this incontestable:

“നാലാം കക്ഷിയുടെ കാലശേഷം ഒരു കൊല്ലത്തിനകം മൂന്നാം കക്ഷിക്കു ഒന്നാം രണ്ടും കക്ഷികൾ ഓരോരുത്തരും അഞ്ഞൂറുരൂപാ വീതം പലിശക്കൂടാതെ കൊടുത്തു രജിസ്റ്റർ രേഖാ വാങ്ങേണ്ടതും അപ്രകാരം ഏതെങ്കിലും കക്ഷി കൊടുക്കാതിരുന്നാൽ ടി സംഖ്യ ടി അവധിക്കു ശേഷം കൊടുക്കാത്ത കക്ഷിയുടെ വീതം വസ്തുവിൽ സ്ഥാപിച്ചു യഥേഷ്ടം വസൂലാക്കിയെടുപ്പാൻ മൂന്നാം കക്ഷി അന്നമ്മക്കു അവകാശമുണ്ടായിരിക്കുന്നതുമാകുന്നു.”

32. Hence, when the amount of Rs.500/- alone stands charged on the property as a capital sum, without any further obligation on the appellant towards interest or other incidental expenses, it is irrefragible that if the appellant pays it to the first respondent or deposits it in court, the said encumbrance would stand extinguished. Indubitably, it is only on account of this amount being still unpaid - whether because the first respondent has refused to accept it or whether the appellant has failed to offer it - that the charge on the property still subsists.

33. Pertinently, the first respondent does not have a case that any amount more than Rs.500/- is due to her under the Partition Deed, even as on date; nor that the said Deed has been rendered void or ineffective on account of this amount not having been offered to her within the period of one year stipulated therein. She, however, asserts very strongly that she will not accept this amount from the petitioner solely for the reasons stated by her in the affidavit dated 29.07.2020, the averments in which are as below:

“3. I painfully submit that my conscience is not willing to accept the money, though the same was never tendered to me.

The reasons for taking such a decision are the following:

a. Ever since my marriage in 1967, the appellant, my elder brother never had any contact with my family. None of the family functions were invited by him.

b. My husband is an autorickshaw driver, aged 78, and the appellant maintains a hostile attitude towards him and our family through out. On many occasions, he insulted my husband in the presence of our relatives and public.

c. The Marriage of the appellant's daughter, Jyothi, was conducted on 17.2.2020. Neither myself nor my other brother, the 2nd respondent were invited.

d. In 2007, on the 1st death anniversary ceremony of mother, the appellant publicly humiliated me and my husband in the presence of our other relatives.

e. He was dead against our marriage, since my husband belongs to a poor family compared to my family. The appellant thereafter never acknowledged us.

f. I was physically prevented from attending my mother at her last days by the appellant.

g. My daughter in law, aged 34, passed away on 16.7.2020 and even after knowing the casualty, the appellant had not even made a phone call.

4. The following facts are also submitted.

4.1. On 15.7.2020 the appellant submitted before this Court that the marriage of his daughter could not be conducted due to the encumbrance over the property. The marriage was already solemnized on 17.2.2020 at Kothamangalam, 10 days prior to the filing of the Appeal.

4.2. The appellant never offered the money and we are not in talking terms since my marriage in 1967.

4.3. On 30.11.2019, the Trial Court recorded that the petitioner has no oral evidence, whereas it is averred that my counsel refused to cross examine the appellant.

4.4. Even though the appellant admitted that the amount is not paid so far, it is also averred in the appeal memorandum that the amount is already paid.

5. I will not raise any claim over the property owned by the appellant as his sister by way of succession. I don't want an inch of his property."

34. It is thus luculent that the respondent has no case that the petitioner is legally incompetent to tender Rs.500/- to her or that such payment can be refused to be accepted by her for any justified cause. Her only assertion is that she is refusing the payment solely because of the personal reasons afore. Of course, she also has a contention that since the marriage of the appellant's daughter had been conducted even prior to the Original Petition before the District court had been filed, his averment that the property was being sold for such purpose is untrue.

35. In the conspectus of the above, the question that emerges is whether, in the circumstances *ut supra*, the appellant was justified in invoking Section 57 of the TP Act.

36. From the discussion on the law indited in the earlier paragraphs of this judgment, there can be little ground for divergence that the provisions of Section 57 of the TP Act would come to play in a case of this nature, whether the sale been conducted by the court or in execution of a decree or by parties outside court.

37. However, as noticed above, the learned District Judge has dismissed the appellant's application acceding to the contention of the first respondent stating: '*It was argued that from above, it can be taken that the section encompasses a situation prior to the sale also, and since the petitioner intends to sell the property after removing the encumbrance, it will apply, I do not agree. What is stated is only that the section empowers a party to free an encumbrance before a sale and by no means, it can be brought to the case at hand where a direction for payment in a partition deed is sought to be enforced*'. I am afraid that this view cannot obtain jural imprimatur in the light of the position of law seen above, since what is sought for by the petitioner is not to enforce a direction for payment in the Partition Deed, but to declare that the property is free of the encumbrance

subsisting on account of the amount under the Partition Deed remaining unpaid.

38. Further, the impugned order seems to travel in the direction that it is only after a sale is over can Section 57 of the TP Act be invoked. This again is misplaced because it is limpud from a mere reading of the said Section that a party to a sale can seek the assistance of the Court at the time when the sale of an encumbered property is proposed, which is apodictic from sub-section 2(b) of the said Section, that enables the court to issue appropriate orders as mentioned therein 'for giving effect to the sale'.

39. As far as the present case is concerned, the first respondent is refusing to accept the amount of Rs.500/- from the appellant or to issue the receipt for discharge of the said encumbrance without any valid legal reason, except that on account of the rift between her and the appellant, she is 'unwilling' to do so. However, she has no case that their personal disputes casts any obligation or encumbrance over the property of the appellant. Further, she only says that 'her conscience is not willing to accept the money'; however, without showing any cause against its tender or deposit by the appellant. Moreover, since the section does not mandate the court to be satisfied of the reasons for the proposed sale

and hence the contention of the respondent - that the assertions of the appellant regarding the necessity of it so as to conduct his daughter's marriage being untrue - is irrelevant. All what is necessary for the appellant is to plead and show the factum of a proposed sale and nothing more.

40. In such scenario, I am of the sure opinion that the learned District Judge has erred in dismissing the application of the appellant under Section 57 of the TP Act, holding it to be not maintainable, since the appellant has clearly averred therein that he intends to sell his property as per Exhibit A5 sale agreement.

41. Axiomatically, I am of the considered view that the impugned order must fail; and that the appellant is entitled to a declaration under Section 57 of the TP Act, since the first respondent has shown no legally acceptable cause whatsoever against such.

42. What now survives is whether the Original Petition would need to be remanded to the District Court or if this Court would be justified in issuing the declaration as sought for by the appellant. Since the stand of the first respondent is available on record, through the affidavit dated 29.07.2020, there arises no reason for further evidence to be led by the parties and this is conceded by Sri.Shiju Varghese also. I am, therefore, convinced that even if this Court

remands the Original Petition, it would only be a formality, since the learned District Court will be obligated, in the afore factual narration and the admissions of the first respondent, to issue necessary directions and declarations in favour of the appellant within the purlieus of Section 57 of the TP Act.

Thus, in summation, I allow this appeal and set aside the impugned order of the learned District Judge; consequently, permitting the appellant to tender the amount of Rs.500/- to the first respondent, by depositing it in the District Court; in which event, the same will be entitled to be withdrawn by her. It is, resultantly, declared that on such payment by the appellant, the petition schedule property will stand freed from the charge on it, created as per the terms of the Partition Deed, Document No.1873/1980 of the Puthencruz SRO.

Taking into account the rather exceptional nature of the legal issues presented in this appeal, I make or order as to costs and direct the parties to suffer their respective costs.

Sd/-
Devan Ramachandran, Judge