Mary Jacob (Mary Kuriakose) vs Annexure R1(A): Copy Of Transfer ... on 6 February, 2013

Author: C.T.Ravikumar

Bench: C.T.Ravikumar

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

THURSDAY, THE 2ND DAY OF JULY 2015/11TH ASHADHA, 1937

Crl.Rev.Pet.No. 102 of 2014 ()

AGAINST THE JUDGMENT IN CRA 222/2012 of THE COURT OF Vth ADDITIONAL SESSIONS JUDGE, ERNAKULAM DATED 06-02-2013

AGAINST THE ORDER IN CMP NO.489/2011 IN M.C.NO.38/2009 of THE COURT OF JUDICIAL FIRST CLASS MAGISTRATE-I,ERNAKULAM DATED 21.12.2011

REVISION PETITIONER/2ND RESPONDENT/2ND RESPONDENT:

MARY JACOB (MARY KURIAKOSE)
D/O. LATE P.C. KURIAKOSE, 158
OLD NO. 71/1, NANDIDURG ROAD, BANGALORE 46.

BY ADVS.SRI.GEORGE THOMAS (MEVADA)(SR.)
SRIN.RAYNOLD FERNANDEZ
SRI.MANU GEORGE KURUVILLA
SMT.RINU JOSE
SRI.AMAL GEORGE

RESPONDENTS/APPELLANTS & RESPODENTS 1 & 3/
PETITIONERS & RESPONDENT NO.1 :

1. ELIZABETH JACOB, AGED 48 YEARS,
   D/O LATE C.T GEORGE, 4F KB APARTMENTS
   NEAR FATHIMA CHURCH, KADAVANTHARA P.O
   ERNAKULAM, KOCHI 20.

2. SHEFALY ANN JACOB, AGED 22 YEARS
   D/OELIZABETH JACOB, 4F KB APARTMENTS
   NEAR FATHIMA CHURCH, KADAVANTHARA P.O

ERNAKULAM, KOCHI 20.

3. JACOB KURIAKOSE,
S/O LATE P.C.KURIAKOSE, 158, OLD NO. 71/1,
NANDIDURG ROAD, BANGALORE 46.

4. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM 682031.

R1 & 2 BY ADV. SRI.V.PHILIP MATHEW
R4 BY PUBLIC PROSECUTOR SMT.P.MAYA

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 02-07-2015, ALONG WITH CRRP. 111/2014, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.Rev.Pet.No. 102 of 2014

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE 1: TRUE PHOTOCOPY OF THE PROOF AFFIDAVIT IN MC 38 OF 2009.

ANNEXURE 2: TRUE PHOTOCOPY OF THE UNDERTAKING IN WRITING IN CC 728 OF 1995 OF JFM COURT, MAVELIKKARA DATED 15/04/2000.

ANNEXURE 3: TRUE PHOTOCOPY OF THE ADVERTISEMENT IN REAL ESTATE WORLD PORTAL DOWNLOADED FROM THE INTERNET DATED 22/03/2014.

RESPONDENTS' EXHIBITS:

ANNEXURE R1(a): COPY OF TRANSFER CERTIFICATE DATED 23/10/1998 ISSUED TO 2ND PETITIONER/2ND RESPONDENT.

ANNEXURE R1(b): COPY OF POSTAL ENVELOPE ADDRESSED TO 1ST PETITIONER DATED 29/798.

ANNEXURE R1(c): COPY OF PLAINT, O.S.NO.9215/2013 ON THE FILE OF CITY CIVIL COURT, BANGALORE.

ANNEXURE 1: TRUE PHOTOCOPY OF THE JOINT MEMO FILED BY THE PARTIES DATED 15/4/2000.

ANNEXURE 2: TRUE PHOTOCOPY OF THE RECEIPT DATED 15/04/2000.

// TRUE COPY //

TKS

P.S. TO JUDGE

"C.R."

C.T.RAVIKUMAR, J.

Crl.R.P.Nos.102 & 111 of 2014

Dated 2nd July, 2015

ORDER

The former revision petition is filed against the judgment in Crl.A.No.222 of 2012 passed by the Court of the Additional Sessions Judge-V, Ernakulam whereby the order dated 21.12.2011 in CMP. No.489 of 2011 in M.C.No.38 of 2009 of the Court of the Judicial First Class Magistrate-I, Ernakulam was set aside. The same revision petitioner filed the latter revision petition against the judgment in Crl.A.No.225 of 2012 of the same Court whereby the order in CMP.No.490 of 2011 in the aforesaid M.C.No.38 of 2009 was interfered with and remanded to the trial court for fresh disposal, in accordance with law. In fact, it is a common judgment. For the sake of convenience, hereafter in this order, the parties are referred to in accordance with their status in Crl.R.P.No.102 of 2014. Respondents 1 and 2 are respectively the estranged wife and daughter of the 3rd respondent and the revision petitioner is the sister of the 3rd respondent. A succinct narration of the facts is required for a proper disposal of these revision petitions.

2. The marriage between the first respondent and the 3rd respondent was solemnised on 8.7.1990 and the 2nd respondent was born in their wedlock on 29.6.1991. The mother of the revision petitioner/the mother-in-law of the first respondent died on 24.1.2008 and in fact, her husband viz., the father of the revision petitioner and the third respondent predeceased her. The revision petitioner and the third respondent were having another sibling and she pre-deceased the parents. After the death of the parents the disputed house, claimed to be the shared household, and the contenement that situate in the State of Karnataka were inherited by the revision petitioner and the third respondent. The first respondent was taken to that house after the marriage on 8.7.1990 and she claimed to have resided there from 1991 to 1994 and thereafter, during 1997-1998. Subsequent to the death of the in-laws the first respondent filed M.C.No.38 of 2009 before the Court of Judicial First Class Magistrate-I, Ernakulam under Section 12 of the Protection of Women from Domestic

Violence Act (for short `D.V. Act'). It was filed with the following prayers:-

> "a. Pass an order prohibiting the respondents from alienating, encumbering, charging or creating any interest over the shared household - 158, Old No.71/1 Nandidurg Road, Bangalore-46, which will any way affect the right of the petitioners and communicate the said order to the SRO, Nandidurg Road, Bangalore and to the SHO, J.C.Nagar, Police Station, Bangalore.
>
> b. Direct respondents to pay a sum of Rs.10,00,000/- (Rupees Ten lakhs only) as compensation to the petitioners for the injuries caused by acts of domestic violence committed by them.
>
> c. Direct the first respondent to pay the maintenance at the rate of Rs.10,000/- (Rupees ten thousand only) per month to petitioners.
>
> d. Pass an order directing respondents to make arrangements to enable the petitioners to reside peacefully in the shared household - 158, Old No.71/1 Nandidurg Road, Bangalore-46, without any threat or harassment from respondents.
>
> e. Pass such order or orders as this Hon'ble court deem fit and proper under the given facts and circumstances of the case for protecting the applicant from domestic violence and in the interest of justice."

3. The first respondent filed M.C.No.38 of 2009 stating that the marriage between herself and the third respondent was solemnised as per the religious rites and ceremonies, on 8.7.1990 and thereafter they were residing together at House No.158 (Old No.71/1) of Nandidurg Road, Bangalore-46 (the house in question) and that it is her shared household. It was further alleged therein that she was subjected to physical and mental cruelty and that she lived there from 1991 to 1994 and also during 1997-1998. It was also stated therein that from 1998 onwards the first and third respondents were living separately and that the first and second respondents were residing at Ernakulam in a rented building. In fact, the second respondent herein was the 2nd petitioner therein. Essentially, they filed the petition as they required an accommodation in the shared household of the first respondent on being faced with difficulty in paying rent for the house at Ernakulam. It was also alleged therein that they got reliable information that the revision petitioner and the 3rd respondent were proposing to sell the shared household and therefore, it was sought to refrain them from transferring the shared household. A further prayer to direct the 3rd respondent herein/the first respondent therein to pay the maintenance at the rate of 10,000/- per month was also sought for besides a residential order directing the respondents therein to make arrangement for the peaceful residence of the petitioners in the shared household. Evidently, yet another prayer claiming 10,00,000/- as compensation from the respondents therein viz., the revision petitioner and the 3rd respondent herein was also sought for. On due process, the respondents therein/the revision petitioner and the 3rd respondent herein appeared before the court and they denied the allegations. After considering the arguments advanced and the evidence adduced by the parties, the learned Magistrate allowed M.C.No.38 of 2009 in part as per order dated 4.9.2010 as hereunder:-

"1) The petitioners are entitled to reside the house No.158 (Old No.71/1) Nandidurga road, Bangalore till the said property and building are partitioned, and after partition, the petitioners are entitled to reside in the share allotted to the 1st respondent herein.

2) The respondents are restrained from committing any act that would affect the peaceful residence of the petitioners in the above house/building.

3) The 1st respondent is restrained from alienating, transferring, selling or creating encumbrance upon his share over the above said property.

4) Respondents are restrained from committing any act of domestic violence against the petitioners.

5) The prayer of the petitioners to grant compensation and maintenance is disallowed. But, it is made clear that the petitioners has the right to file a fresh petition claiming maintenance and to plead and prove the source of income of the parties.

6) The SHO, JC Nagar Police Station, Bangalore is directed to give police protection to the petitioners, if requested by the petitioners in writing."

Subsequently, C.M.P.Nos.489 and 490 of 2011 were filed by respondents 1 and 2 herein before the learned Magistrate in M.C.No.38 of 2009. In fact, prior to that, another petition viz., C.M.P.No.252 of 2011 was filed for a direction to break open the door of the shared household and afford protection to reside thereon. C.M.P.No.489 of 2011 was filed with the prayer to modify the order passed in MC.No.38 of 2009 and to permit the petitioners therein/respondents 1 and 2 herein to reside in the shared household ignoring partition deed executed between first and second respondents therein that is, the revision petitioner and the 3rd respondent herein. C.M.P.No.490 of 2011 was filed with the prayer to proceed against the respondents therein/the revision petitioner and the third respondent herein under Section 31 of the D.V. Act for violating the order of the court. All those Civil Miscellaneous Petitions filed in M.C.No.38 of 2009 viz. C.M.P.Nos.252, 489 & 490 of 2011 were disposed of by a common order dated 21.12.2011. At this juncture, it is to be noted that pending M.C.No.38 of 2009 a suit for partition viz., O.S.No.5461 of 2009 was filed by the revision petitioner before the Court of Additional City Civil Judge-38, Bangalore City for effecting partition of the shared household and the appurtenant land. In the said suit the 3rd respondent remained ex parte and ultimately the suit was decreed and it was found that the revision petitioner herein is entitled to get half share in the plaint schedule property viz., the house in question and the land appertaining to it. Needless to say that the third respondent herein is entitled to the other half. These facts were in fact, taken note of by the learned Magistrate while passing orders in M.C.No.38 of 2009. In fact, the order would reveal that the preliminary decree in the said suit was produced in that proceedings and it was marked as Ext.D1. The fact that going by Ext.D1 decree the 3rd respondent herein was having only half share over the shared household was also taken note of by the learned Magistrate. It was after taking note of Ext.D1 decree that M.C.No.38 of 2009 was

disposed of as per order dated 4.9.2010 as aforesaid. It is to be noted that while passing orders in M.C.No.38 of 2009 the learned Magistrate after perusing Ext.D1 arrived at the conclusion that at that stage respondents 1 and 2 herein/the petitioners therein got the right to reside in the shared household till it is partitioned by metes and bounds and after partition they would be having only the right to reside in the share allotted to the first respondent therein/the 3rd respondent herein. Availing the liberty granted under Ext.D1 it is said that the revision petitioner and the third respondent effected partition of the shared household as also the appertaining land and thereafter, in terms of the deed whereby they effected partition, a final decree was also passed on 29.9.2011 in O.S.No.5461 of 2009 by the Court of Additional City Civil Judge-38, Bangalore City. The prayer in C.M.P.No.489 of 2011 itself would reveal that it was filed after the passing of the preliminary decree and the consequential registration of the partition deed executed between the revision petitioner and the third respondent. The learned Magistrate considered all such aspects while disposing of C.M.P.Nos 252, 489 and 490 of 2011 as per common order dated 21.12.2011. After hearing both the parties the learned Magistrate found that by the execution of the partition deed allotting the entire building to the share of the revision petitioner, the first respondent herein/the petitioner therein would not be able to reside in the shared household and that the court could not ignore a decree passed by a competent Civil Court regarding the share of the parties. Consequently, the prayer in C.M.P.No.489 of 2011 to modify the order dated 4.9.2010 in M.C.No.38 of 2009 and to permit the first and second respondents to reside in the shared household ignoring the partition deed was held as not allowable. In C.M.P.No.490 of 2011 which carried the prayer to proceed against the revision petitioner and the third respondent for violation of the order passed by the learned Magistrate in M.C.No.38 of 2009 in the light of the partition effected based on a decree passed by a competent Civil Court it was observed that it could not be held that the revision petitioner and the third respondent have violated the orders passed by the court though the right of the first respondent to reside in the shared household was virtually taken away by the partition deed. Accordingly, it was found that there was no ground to proceed against the revision petitioner and the third respondent under Section 31 of the D.V. Act for violation of orders. C.M.P.No.252 of 2011 seeking a direction to break open the shared household and to afford protection to the first and second respondents to reside in that house was also found not allowable as by virtue of the said deed the revision petitioner herein got the exclusive ownership and possession of the entire shared household. At the same time, it was observed that the first respondent herein would have the right to demand alternate accommodation from the 3rd respondent herein/the first respondent therein, as she is unable to reside in her shared household due to the execution of the partition deed. With the said observations virtually, all the three miscellaneous petitions were dismissed as per common order dated 21.12.2011. Respondents 1 and 2 herein/the petitioners in the aforesaid miscellaneous petitions preferred appeals against the orders in C.M.P.Nos.489 and 490 of 2011 as Crl.A.Nos.222 of 2012 and 225 of 2012 respectively. It is to be noted that though as per the aforesaid common order C.M.P.No.252 of 2011 filed by the first respondent herein to break open the shared household and afford her protection to reside in that house was also dismissed assigning the aforementioned reason obviously, no appeal was filed against the same. The Court of Additional Sessions Judge-V, Ernakulam considered the criminal appeals and allowed the appeals as per a common judgment dated 6.12.2013. As per the said common judgment the learned Sessions Judge set aside the common order passed by the learned Magistrate in C.M.P.Nos.489 and 490 of 2011 though the learned Magistrate, in fact, dismissed C.M.P.No.252 of 2011, as well, by the said common order

assigning the aforementioned reason and respondents 1 and 2 did not file any appeal against the said order. As per the impugned common judgment dated 6.12.2013 the appellate court ordered thus:-

> "(a) As the purported final decree and the partition deed are non est and only to be ignored the appellants are entitled to reside at the shared household which is the ground floor of the house building bearing No.158 old No.71/1 Nandidurga road, Bangalore.
>
> (b) The 2nd respondent is hereby directed to remove structures if any made after obtaining the purported final decree and make the ground floor of the said building inhabitable at her own costs within 45 days from the date of this order.
>
> (c) If respondents 1 & 2 are causing any obstruction to the entry of the appellants in to the shared household or causing any obstruction to the peaceful residence of the appellants in the ground floor of the said building the appellants are at liberty to approach the S.H.O. of the Police Station concerned first and if the police has not taken action to implement the above order and remove the obstruction the appellants are entitled to approach the learned Magistrate court which passed the order in M.C.38/09.
>
> (d) The appellants are entitled to recover Rs.5000/- as costs of appeal from the respondent No.1 & 2 and from their assets.
>
> (e) CMP 490/2011 is remanded back to the JFCM-I, Ernakulam for fresh disposal according to law within 4 months from today after affording reasonable opportunity to both sides to adduce evidence and hearing both sides and untrammelled by any of the observations made in this common judgment.
>
> (f) It is further made clear that the learned Magistrate if found that there is breach of protection order by the respondents or any of the respondents the Magistrate shall proceed against them/him/her after framing charge as stated under sub section (3) of S.31 of the PWDV Act 2005.
>
> (g) The parties in CMP 490/11 are directed to appear before the trial court on 21.12.2013."

As noticed hereinbefore, Crl.R.P.No.102 of 2014 is filed against the judgment in Crl.A.No.222 of 2012 and Crl.R.P.No.111 of 2014 is filed against the judgment in Crl.A.No.225 of 2012.

4. I have heard the learned Senior counsel Sri.George Thomas Mevada appearing for the revision petitioner in both these revision petitions and Sri.Philip Mathew, the learned counsel appearing for respondents 1 and 2. Though notice was issued to the 3rd respondent it was returned initially and thereafter it was served by affixture.

5. The learned Senior counsel appearing for the revision petitioner submitted that a perusal of the order of the learned Magistrate in M.C.No.38 of 2009 would reveal that it was passed after taking into consideration the judgment and decree in O.S.No.5461 of 2009. The subsequent common order in the Civil Miscellaneous Petitions in M.C.No.38 of 2009 and the common judgment against which above criminal revision petitions are filed, would reveal that they were passed taking note of the factum of passing of a preliminary decree in O.S.No.5641 of 2009, the consequential partition deed as also the final decree. The learned Magistrate, in the order in M.C.No.38 of 2009, arrived at the following conclusion:-

> "So, the possible conclusion at this stage is that the petitioners have the right to reside in their shared household till it is partitioned by metes and bounds, and after partition, they have the right to reside in the share allotted to the first respondent."

The order dated 4.9.2010 was passed in M.C.No.38 of 2009, as already mentioned, in tune with the aforesaid conclusion. It was thereafter that respondents 1 and 2 herein/the petitioners in M.C.No.38 of 2009 filed C.M.P.Nos.252, 489 and 490 of 2011 before the court and the common order was passed thereon dismissing them with observations, as aforesaid. Thus, obviously, honouring the judgment and preliminary decree, the partition and the final decree in the aforesaid suit the learned Magistrate dismissed those petitions observing that the first respondent still got the right to demand alternate accommodation from the 3rd respondent herein. However, the learned Sessions Judge, after considering the very same aspects, held that the decree passed by the Court of City Civil Judge-38, Bangalore City and also the partition deed executed pursuant to the final decree are non est and therefore, they are only to be ignored and found that the petitioners therein/first and second respondents herein are entitled to reside in the shared household which is the ground floor of the house building bearing No.158 (Old No.71/1), Nandidurg road, Bangalore. Consequential orders were also passed as mentioned hereinbefore. The learned Senior counsel for the revision petitioner contended that the action on the part of the learned Sessions Judge in arriving at the finding and issuing orders to the effect that the final decree and the partition deed are non est and therefore, to be ignored is one which is passed without any jurisdiction as a decree passed by a competent Civil Court could not be interfered with and set aside in a collateral proceedings, that too, in a criminal proceedings. To buttress the said contention the learned Senior counsel relied on the decision of the Hon'ble Apex Court in Union of India and Others v. Major S.P.Sharma and Others ((2014) 6 SCC 351). The learned Senior counsel, in the light of the said decision, further contended that when once it is found that the learned Sessions Judge exceeded the jurisdiction in holding the final decree and partition deed as non est and that the consequential orders are founded on such finding, the impugned common judgment is liable to be set aside. Per contra, the learned counsel appearing for respondents 1 and 2 submitted that the common judgment passed by the learned Sessions Judge is not suffering from any legal infirmity or perverseness and the said judgment cannot be said to be passed against the weight of evidence or infected with an error in law. In short, according to the learned counsel for respondents 1 and 2, the impugned common judgment is only to be sustained. The learned counsel asserted that the final decree was also produced along with the objection filed by the revision petitioner herein/2nd respondent therein, before the learned Magistrate and further contended that as held by the learned Sessions Judge the said decree was obtained by the revision petitioner by fraud and a decree obtained by fraud is a nullity. Therefore, the learned Sessions Judge

was perfectly right in holding the decree and the consequential partition deed as non est, it is contended. To substantiate the said contentions the learned counsel relied on the decisions of the Hon'ble Apex Court in S.P.Chengalvaraya Naidu v. Jagannath and Others (1995 KHC 182), A.V.Papayya Sastry and Others v. Government of A.P. and Others ((2007) 4 SCC 221) and Ruby Sales and Services (P) Ltd. and Another v. State of Maharashtra and Others ((1994) 1 SCC 531). Yet another contention taken is that the final decree which was passed in O.S.No.5461 of 2009 by the Court of Additional City Civil Judge-38, Bangalore City has to be ignored as it is a compromise decree passed based on the partition deed effected availing the liberty granted by the preliminary decree and that the said agreement was entered into by the revision petitioner and the third respondent to defeat the right available to respondents 1 and 2 by virtue of the order in M.C.No.38 of 2009. In the context of the said contention it is only apropos to note the following aspects:-

> Taking note of the judgment and decree in O.S.No.5461 of 2009 of the Court of the Additional City Civil Judge-38, Bangalore City the learned Magistrate arrived at the conclusion in M.C.No.38 of 2009 that the petitioners therein (respondents 1 and 2 herein) got right to reside in their shared household till it is partitioned by metes and bounds and after partition, they have the right to reside in the share alloted to the first respondent therein (the third respondent herein). Further orders and directions were issued as per the order in M.C.No.38 of 2009 in tune with such conclusion. Even then, respondents 1 and 2 did not challenge the said order in M.C.No.38 of 2009 dated 4.9.2010. True that, subsequently, CMP.No.489 of 2011 was filed seeking modification of the order passed in M.C.No.38 of 2009 and to permit them to reside in the shared household ignoring the partition deed executed between the revision petitioner and the 3rd respondent herein. To fortify the said claim and the contention in support of it the learned counsel relied on the decisions in Narayanan v. Rajamany (1995 (2) KLT 351), Raman Pillai Kanakku Madhavan Nair v. Gowri Pillai Thankachi Bhagavathi Pillai Thankachi (1953 KLT 382), Prithvichand Ramchand Sablok v. S.Y.Shinde ((1993) 3 SCC 271) and Ruby Sales and Services (P) Ltd. and Another v. State of Maharashtra and Others ((1994) 1 SCC 531). Taking note of the other contentions raised on behalf of the revision petitioner that the first respondent herein has already abandoned the claim for monetary benefits the learned counsel for respondents 1 and 2 contended that the said contention is unsustainable for various reasons. Firstly, it is contended that only an existing right could be waived or relinquished and for waiving or relinquishing a right there should be a conscious and voluntary waiver.
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> To support the said contention the decisions in A.P.Srtc and Others v.
>
> S.Jayaram ((2004) 13 SCC 792), Ayanikkattu Unniraja and Others v. K.P.Gurudas (2014 (1) KHC 473), Mariam Koshy v. Jolly Varghese and Others (2007 (4) KLT 803), Usha Thayyil and Others v. State of Kerala and Others (2009 (4) KLT 1), Sreesan E.A. v. Manager, P.M.S.A.High School and Others (2012 (3) KLT

> 551) and Ravindran Nair v. Sakunthala Amma (1978 KLT 246) were relied on. Learned counsel for respondents 1 and 2 would further submit that even if the parties are living separately the wife who has been living separately from her husband even before the coming into force of the D.V. Act would also be entitled to the benefit of the said Act.

To drive home the said point the learned counsel relied on the decisions in Bhanot V.D. v. Savita Bhanot (2012) 3 SCC 183), Sabana alias Chand Bai and Another v. Mohd. Talib Ali and Another (2014 KHC 2373) and Saraswathy v. Babu ((2014) 3 SCC 712).

6. In the light of the aforesaid rival contentions I will firstly consider the question whether a partition deed effected pursuant to preliminary decree and final decree passed pursuant thereto by a competent Civil Court could be held as non est and therefore liable to be ignored, in a collateral proceedings that too, in a criminal proceedings. The said question is no more res integra as the said question was pointedly posed for consideration and answered by the Hon'ble Apex Court in Inderjit Singh Grewal v. State of Punjab (2012 Crl.L.J.

309) and Union of India and Others v. Major S.P.Sharma and Others ((2014) 6 SCC 351). It will only be appropriate to refer to the question of law that came up for consideration of the Hon'ble Apex Court in Inderjit Singh's case (supra) and the same reads thus:-

> "The appeal raises a substantial question of law as to whether the judgment and decree of a competent Civil Court can be declared null and void in collateral proceedings, that too, criminal proceedings."

In this context, it is appropriate to note that a perusal of the impugned judgment in this case would make it clear that respondents 1 and 2 herein took up a contention before the learned Sessions Judge that the said decree in O.S.No.5641 of 2009 was obtained by fraud and therefore, the partition deed executed pursuant to the preliminary decree and the final decree passed pursuant thereto were only to be ignored as they are non est. In Inderjit Singh's case (supra) also a plea of fraud was alleged by the 2nd respondent therein in respect of a decree of divorce obtained from a Civil Court by her husband and in fact, in that case, such a decree was obtained by mutual consent. Essentially, paragraph 6 of the said decision would reveal that she had resisted the appeal contending that the decree of divorce was a nullity and it was obtained by fraud. Paragraph 10 of the said decision would reveal that while considering the aforesaid aspects the Hon'ble Apex Court considered yet another question as to whether the reliefs sought for in the complaint involved in that case could be granted by a criminal court so long as the judgment and decree of a Civil Court subsist. In the contextual situation, it is apposite to refer to paragraphs 11-14 in the said decision. Paragraph 11 reads thus:-

> "11. It is a settled legal proposition that where a person gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eyes of the law as fraud unravels everything. "Equity is always known to defend the law from crafty evasions and new subtleties invented to

> evade law." It is a trite that "Fraud and justice never dwell together" (fraus et jus nunquam cohabitant). Fraud is an act of deliberate deception with a design to secure something, which is otherwise not due. Fraud and deception are synonymous. "Fraud is an anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine." An act of fraud on court is always viewed seriously. (Vide: Meghmala & Ors. v. G.Narasimha Reddy & Ors., (2010) 8 SCC 383:
>
> (2010 AIR SCW 5281)."

Even after making such observations in the light of the earlier decision of the Hon'ble Apex Court in Meghmala & Ors. v. G. Narasimha Reddy & Ors. ((2010) 8 SCC 383) in paragraph 12, the Hon'ble Apex Court raised another point for consideration that is, whether it is permissible for a party to treat the judgment and order as null and void without getting it set aside from the competent court. Thereafter, it was found that the said issue is no more res integra and it stood settled by a catena of decisions of the Hon'ble Apex Court. In the light of the decisions in State of Kerala v. M.K.Kunhikannan Nambiar Manjeri Manikoth Naduvil (dead) & Ors (AIR 1996 SC 906) and Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. (AIR 1997 SC 1240) it was held that for setting aside such an order, even if void, the party has to approach the appropriate forum. Paragraphs 13 and 14 also pertain to consideration of the aforesaid question. In paragraph 13 thereunder the decision of the Hon'ble Apex Court in Sultan Sadik v. Sanjay Raj Subba & Ors. (AIR 2004 SC 1377) to the effect that even if an order is void or voidable the same requires to be set aside by the competent court was taken note of. Virtually, in paragraph 14 an earlier decision of the Hon'ble Apex Court in M.Meenakshi & Ors. v. Metadin Agarwal (dead) by Lrs. & Ors. ((2006) 7 SCC 470) was quoted with approval. In that case, the Hon'ble Apex Court considered the issue at length and observed that if the party feels that the order passed by the court or a statutory authority is non est/void, he should question the validity of the said order before the appropriate forum resorting to the appropriate proceedings. The findings of the Hon'ble Apex Court in the said decision was thereafter quoted with approval as hereunder:-

> "It is well settled principle of law that even a void order is required to be set aside by a competent Court of law, inasmuch as an order may be void in respect of one person but may be valid in respect of another. A void order is necessarily not non est. An order cannot be declared to be void in collateral proceedings and that too in the absence of the authorities who were the authors thereof."

The Hon'ble Apex Court also took note of its earlier decision in Sneh Gupta v. Devi Sarup & Ors. ((2009) 6 SCC 194) reiterating the similar view. Virtually, the said decision was restated by the Hon'ble Apex Court in Union of India and Others v. Major S.P.Sharma and Others ((2014) 6 SCC 351). Paragraph 70 of the said decision assumes relevance in this context and it reads thus:-

> "A decision rendered by a competent Court cannot be challenged in collateral proceedings for the reason that if it is permitted to do so there would be "confusion and chaos and the finality of proceedings would cease to have any meaning."

In view of the said decisions it is evident that the position was settled by the Hon'ble Apex Court that even if a party feels that an order or decree passed by a court of competent jurisdiction or an authority is non est/void the said party should question the validity of the said order before the appropriate forum resorting to appropriate proceedings and as long as the decree of a Civil Court subsists a Criminal Court cannot arrive at a finding that the said decree passed by the competent Civil Court is non est or void in the collateral proceedings before it. In short, the essence of the decision is that even if a decree or an order is non est or void in the estimation of a party, the party who is entertaining such a feeling should approach the appropriate forum in appropriate proceedings and get it set aside and unless a court of competent jurisdiction set aside such decree or an order over which the party entertained such a feeling it could not be said to be non est whilst it has to be treated as valid. When that is the exposition of law by the Hon'ble Apex Court I am of the view that respondents 1 and 2 cannot rely on the decisions referred to hereinbefore to support the finding of the learned Sessions Judge in respect of the final decree passed by the Court of Additional City Civil Judge-38, Bangalore City and also the observation that the said final decree and the partition deed effected pursuant to its preliminary decree are non est and are only to be ignored. In the light of the aforesaid position of law, the reliefs sought for, on treating the partition effected pursuant to the preliminary decree could not have been upheld. Add to it, in this case, a final decree was also passed subsequently. As noticed hereinbefore, the learned Sessions Judge was only considering appeals preferred by respondents 1 and 2 herein against the common order passed by the learned Magistrate in C.M.P.Nos.252, 489 & 490 of 2011 in M.C.No.38 of 2009. When once it is so found the finding of the learned Sessions Judge that the decree passed by the Court of Additional City Civil Judge-38, Bangalore City and the partition deed are non est and therefore, to be ignored has to be held as suffering from legal infirmity and in fact, it is an illegality and the same has to be set at right in invocation of the revisional jurisdiction of this Court. A scanning of the impugned common judgment would reveal that the directions extracted above were passed in Crl.A.Nos.222 & 225 of 2012 by the learned Sessions Judge based on the finding that the first and second respondents are entitled to reside at the shared household. In the said factual and legal positions obtained in this case I am at a loss to understand as to how a criminal court could arrive at a finding that a decree passed by a competent Civil Court in a suit for partition declaring the rights of the parties therein in accordance with law was obtained by fraud. When there are only two legal heirs for the estate of a deceased person how can the declaration of half right to one of them in a properly instituted suit could be said to be `not in accordance with law.' If at all any such grievance exists with respect to the decree or the partition effected pursuant thereto such contentions could be upheld only by a competent forum in appropriate proceedings that too, after specifically raising the necessary allegations with respect to fraud and on proving the same. In such circumstances, even if respondents 1 and 2 feel that the decree was obtained by fraud and the partition deed was not executed in accordance with law, necessarily, they ought to have worked out their remedies in accordance with law, in appropriate proceedings. The learned counsel for respondents 1 and 2 contended that it is a matter which could be gone into by this Court in these revision petitions. I am of the view that as the Hon'ble Apex Court laid down the position of law that a decree of a competent Civil Court could not be challenged in a collateral proceedings that too, in a criminal proceedings, this Court also cannot look into the contentions raised by respondents 1 and 2 on the ground of fraud to challenge the sustainability or otherwise of the final decree and the partition deed in these criminal revision petitions. In this case, yet another aspect also assumes relevance. The decree in

question was passed by the Court of Additional City Civil Judge-38, Bangalore City in O.S.No.5461 of 2009 and the said Civil Court lies within the jurisdiction of the State of Karnataka and in fact, within the jurisdiction of High Court of Karnataka.

7. As noticed hereinbefore, while passing the order in M.C.No.38 of 2009 the learned Magistrate was fully aware of the existence of the judgment and decree of a competent Civil Court in O.S.No.5461 of 2009 which is a partition suit between the revision petitioner and the third respondent herein and evidently, it was taking into account the settled position of law that cautiously and correctly the learned Magistrate moulded the relief while passing the order in M.C.No.38 of 2009. The learned Magistrate ordered that the right of the petitioners therein/respondents 1 and 2 herein, was only the right to reside in the shared household of the first respondent till it is partitioned by metes and bounds and it was also specifically ordered that after the partition they would be having only the right to reside in the share alloted to the third respondent.

8. Bifold contentions, mutually contradictory to each other, are raised by respondents 1 and 2. One is to the effect that no partition deed was actually executed and the other is that the partition deed was executed in such a way to defeat the purpose of the orders in M.C.No.38 of 2009 and therefore, it is vitiated by fraud. It is to be noted that neither before the trial court nor before the appellate court the first respondent took up the contention that the partition deed was not actually executed. On the contrary, a perusal of paragraphs 6 and 12 of the common order passed by the learned Magistrate dated 21.12.2011 and paragraph 2 of the impugned common judgment of the learned Sessions Judge dated 6.12.2013 would undoubtedly reveal that C.M.P.No.489 of 2011 in M.C.No.38 of 2009 against the order of which Crl.A.No.222 of 2012 was preferred, carried the prayer to modify the order passed by the learned Magistrate in M.C.No.38 of 2009 and to permit respondents 1 and 2 (the petitioners therein) to reside in the shared household ignoring the partition deed executed between the revision petitioner and the third respondent viz., respondents 1 and 2 therein. It is also relevant to note that it was based on the contentions raised by respondents 1 and 2 who were the appellants therein that the learned Sessions Judge as per the impugned common judgment held the purported final decree and the partition deed as non est and only to be ignored. In the said circumstances, respondents 1 and 2 cannot be heard to take up the contention, that too for the first time before this Court in the revision petitions filed by the revision petitioner herein/the 2nd respondent therein, that no partition deed was executed between the revision petitioner and the third respondent herein pursuant to the preliminary decree in O.S.No.5641 of 2009 and final decree in FDP.142/2010. These contentions therefore, are liable to be rejected at the threshold. Now, I will consider the next contention, may be, the alternative contention. It is evident that a final decree was also passed in O.S.No.5641 of 2009 by the Court of the Additional City Civil Judge- 38, Bangalore City in FDP.142/2010. Virtually, in the light of the said final decree and the partition deed that the situation whereunder respondents 1 and 2 could not enter into the house and to reside thereon, arose and that prompted them to approach the learned Magistrate again. In the said context, certain other aspects have to be considered. As noticed hereinbefore, as per the preliminary decree in O.S.No.5461 of 2009 the Court of Additional City Civil Judge-38, Bangalore City declared that the plaintiff therein viz., the revision petitioner herein is having half share in the plaint schedule property. Naturally, taking into account the fact that the third respondent is the other legal heir

entitled to the other half, as per the preliminary decree, the revision petitioner and the 3rd respondent were given the liberty to effect the partition in accordance with the said preliminary decree by compromise and to approach the court for partition to be effected by deputing an Advocate Commissioner, in case they find it difficult to effect such partition on agreement. When the learned Magistrate passed the order in M.C.38 of 2009 taking note of the said preliminary decree and made it very clear in the order itself that after partition, respondents 1 and 2 would be having the right to reside only in the share allotted to the third respondent herein, how can they contend that the third respondent and the revision petitioner are liable to be proceeded under Section 31 of the D.V. Act. Evidently, based on the rival pleadings both the courts found that a partition deed was executed. Whether the property in question that is, plaint schedule property is partiable and in what manner it could be partitioned and whether the partition was effected in such a manner solely for defeating the right of the parties could be decided only if respondents 1 and 2 raise such question in appropriate proceedings before the appropriate forum. Evidently, the partition was taken note of and the competent Civil Court passed the final decree. I have no hesitation to hold that a criminal court in collateral proceedings cannot arrive at a finding that the partition effected was not in tune with the preliminary decree especially, when it is the indisputable position that after the partition deed, taking note of it, a final decree was also passed. In such circumstances, if in a collateral proceedings that too, in criminal proceedings, the final decree and also the partition deed are held as non est it would amount to unsettling the finality in the appropriately instituted civil suit as held by the Hon'ble Apex Court. The order in M.C.No.38 of 2009 would reveal that after taking note of the judgment and decree the learned Magistrate held that the right to reside available to the first respondent herein would be confined only to the share that is alloted to the third respondent after the partition. Thus, going by the order passed by the learned Magistrate after partition the right to reside in the shared household of the first respondent would depend upon the partition. In the proceedings in C.M.P.Nos.252, 489 & 490 of 2011 before the trial court and also in Crl.A.Nos.222 and 225 of 2012 the question whether the house in question was partiable and even if it is partiable how it could have been partitioned could not have been decided. The said question cannot be gone into in these proceedings as well. A perusal of the order in M.C.No.38 of 2009 would reveal that it was taking note of all such circumstances that the learned Magistrate issued the order very carefully and cautiously restricting the right of the first respondent to reside in the shared household till it is partitioned by metes and bounds and making the same only in respect of the share to be alloted to the third respondent as the partition was not then effected. True that, at that point of time, by virtue of the order the first respondent was to reside in the ground floor. But, the question is, in such circumstances, even after the partition how could the learned Sessions Judge hold that the ground floor of the said building should be treated as the shared household as relates the first respondent. Is it not an order affecting the partition and the final decree passed by a competent Civil Court ? There is no case for respondents 1 and 2 that going by the partition and the final decree the ground floor has been alloted to the share of the third respondent. In fact, the contention is otherwise. The direction of the learned Sessions Judge is virtually one in supersession of the partition and the final decree and it would amount to allotment of the ground floor towards the share of the third respondent. Thus, in all respects the common judgment of the learned Sessions Judge lancinated the decree of the competent Civil Court, without any jurisdiction, that too in a criminal proceedings. This is clearly a violation of the dictum laid down by he Hon'ble Apex Court in Inderjith Singh Grewal's case and Major S.P. Sharma's case

(supra). In the light of the contentions of respondents 1 and 2 herein I am of the view that it will not be inappropriate to consider another aspect, as well. It appears that the sum and substance of the contentions of respondents 1 and 2 is that even though the revision petitioner herein who is the sister of the first respondent's husband, the third respondent, is having the half right she could enjoy the same only without interfering with the right to reside of the first respondent. At the very outset, it is to be noted that the order in M.C.No.38 of 2009 which was not taken up in appeal though later, sought to be modified, virtually, restricted the right to reside in the house till the partition and thereafter, only in the share alloted to the the third respondent. In this context, it is to be noted that the first respondent being the wife of the third respondent is having only a right to reside in the house if it is her shared household. This position is evident from Section 17 of the D.V. Act which reads thus:-

> "17. Right to reside in a shared household.-
>
> (1) Notwithstanding anything contained in any other law for the time being in force, every woman in a domestic relationship shall have the right to reside in the shared household, whether or not she has any right, title or beneficial interest in the same.
>
> (2) The aggrieved person shall not be evicted or excluded from the shared household or any part of it by the respondent save in accordance with the procedure established by law."

Section 17(2) would reveal that the aggrieved person could be evicted or excluded from the shared household or any part of it by the respondent in accordance with the procedure established by law. It would thus reveal that the right to reside in a shared household cannot be said to be an indefeasible right. In this context, it is also to be noted that under any circumstances if it is made impossible for the aggrieved person to enjoy the accommodation in the shared household sufficient safeguard has been made in the D.V. Act itself to protect the right guaranteed under Section 17(1). A bare perusal of Section 19(1)(f) and Section 19(6) of the D.V. Act would unravel the said position and they read thus:-

> "19. Residence orders.- (1) While disposing of an application under sub-section (1) of Section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order-
>
> (a).....
>
> (b).....
>
> (c).....
>
> (d).....
>
> (e).....

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require.

.....

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties."

(emphasis added) Of course, an order under Section 19(1)(f) is permissible only on satisfaction that domestic violence had taken place. In this case, even according to the first respondent, she left her matrimonial home as early as in the year 1998 and filed the petition under Section 12 of the D.V. Act only in the year 2009. In this case, the revision petitioner is the sister of the third respondent and she along with the third respondent inherited the properties of their parents on their death. It is to obtain her share that the aforementioned partition suit was filed and pursuant to the decree it was partitioned in between the revision petitioner and the third respondent in tune with Ext.D1 decree, referred as such in the order in M.C.No.38 of 2009. The impugned orders would reveal that pursuant to the preliminary decree a partition was effected and a final decree was also passed by a competent Civil Court. In such circumstances, on the strength of a decree of a competent Civil Court and the partition the revision petitioner became entitled to enjoy her share in the said property. There is nothing on record before the court to suggest that the house in question was partiable and, even otherwise essentially, the question whether a property scheduled in a suit for partition is partiable or not is not a matter to be considered in a collateral proceedings and that too, in a criminal proceedings. When the court of competent jurisdiction passed a preliminary decree permitting the parties to the suit to effect partition amicably after declaring the share and thereafter passed a final decree the partition and the decree cannot be set at naught in a criminal proceedings. Respondents 1 and 2 cannot be heard to contend that they were not aware about the suit for partition and also regarding the passing of a preliminary decree in the said suit for partition and in fact, the preliminary decree was produced in the proceedings in M.C.No.38 of 2009 and the order thereon was passed taking into account the same. In such circumstances, respondents 1 and 2 cannot be heard to say that they were not aware that in terms of the preliminary decree a partition might take place adverse to their interest based on an amicable settlement between the revision petitioner and the third respondent and that the order in M.C.No.38 of 2009 also restricted their right to reside only in the share alloted to the third respondent. Certainly, in the light of the settled position of law an endeavour to challenge the partition and decree would not have been made by respondents 1 and 2 in a collateral proceedings and at any time, it could not have been accepted in a criminal proceedings. Section 19(1)(f) of the D.V. Act provides for issuing directions to the `respondent', which term has been defined under Section 2(q) of D.V. Act, to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require. Considering the right which is available under Section 17 and especially, taking into account the circumstances it cannot be said that respondents 1 and 2 could insist for direction to continue residence in the shared household itself ignoring the judgment and decree passed by competent Civil Court whilst the first respondent could only insist

for protection of her right guaranteed under Section 17 of D.V. Act taking note of the provisions under Section 19(1)(f) of the said Act. A combined reading of Section 17(2) and Sections 19(1)(f) and 19(6) of the D.V.Act would reveal that while giving utmost care and protection to an aggrieved party especially, in respect of protection orders, the D.V. Act does not intend to defeat or deny the rights of others available in respect of a shared household lest the provisions under Sections 19(1)(f) and 19(6) would not have been incorporated to ensure protection of right to reside available under Section 17(1), of the D.V. Act. A close scrutiny of the common order of the learned Magistrate would reveal that even while dismissing the Miscellaneous Petitions the learned Magistrate has specifically found that the first respondent herein would have the right to demand alternate accommodation (Is it not alternative accommodation?) from the third respondent herein taking into account the fact that her right to reside in the shared household was made impossible due to the execution of the partition deed. This certainly is the right and protection available in such circumstances, in terms of Sections 19(1)(f) and 19(6) of the D.V. Act. This position makes the impugned common judgment all the more, unsustainable. The first respondent was residing separately from her husband since 1998 and thereafter she did not stay with him in the shared household and she along with the second respondent is residing at Ernakulam. All these circumstances would indicate that it is a fit case for the first respondent to work out her claim for alternate accommodation (alternative accommodation) as against the third respondent, in accordance with law. The above mentioned finding of the learned Magistrate would reveal that the common order dated 21.12.2011 is a well-merited one passed in conformity with the aforementioned provisions of law and also the position of law settled by the Hon'ble Apex Court as mentioned hereinbefore. For the aforesaid reasons, I am of the considered view that the learned Sessions Judge was not justified in upturning the common order passed by the learned Magistrate in C.M.P.Nos.252, 489 and 490 of 2011 in M.C.No.38 of 2009.

9. It is also to be noted that though a common order was passed in C.M.P.Nos. 252, 489 and 490 of 2011 filed by respondents 1 and 2 herein, the order of dismissal in C.M.P.No.252 of 2011 which carried the prayer to issue a direction to the S.H.O., J.C Nagar Police Station, Bangalore to break open the door of the shared household and afford protection to reside thereon, was not challenged by respondents 1 and 2.

10. The long and short of the above discussion is that the challenge against the impugned common judgment has to succeed. Accordingly, the judgment of the Court of the Additional Sessions Judge-V, Ernakulam in Crl.A.Nos.222 of 2012 and 225 of 2012 are set aside and the common order passed by the learned Magistrate dated 21.12.2011 is restored. In the circumstances, in terms of the said orders it will be open to the first respondent to demand alternative accommodation from the third respondent herein, in accordance with law.

The Criminal Revision Petitions are allowed as above.

Sd/-

C.T.RAVIKUMAR Judge TKS