

(2013) 02 KL CK 0044
In the High Court Of Kerala
Case No : OP (C) . No. 589 of 2013 (O)

A. Muraleedharan and A. Sadanandan	APPELLANT
Vs	
A. Sreeja, Sarojini Amma and Shoba	RESPONDENT

Date of Decision : 25-02-2013

Acts Referred:

Citation : (2013) 02 KL CK 0044

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : Srinath Girish and Sri. E. Narayanan, for the Appellant; B. Krishnan for R1 and Sri. R. Parthasarathy for R1, for the Respondent

Judgement

Thomas P. Joseph, J.—Petitioners are defendants 1 and 2 in O.S. No. 105 of 2007 of the Sub Court, Vatakara, a suit for partition filed by the first respondent/plaintiff. First respondent claimed partition and separate possession of 1/3 share of the suit property - 19 percents claiming that the said property belongs to the first respondent and petitioners as per a partition deed of the year, 1980. Petitioners filed written statement disputing various claims and later, an additional written statement with a counter claim. In short, their contention is that partition deed of the year, 1980 in which they are represented by a power of attorney who acted against their interest and on other grounds is not binding on them, properties are to be partitioned as if there was no such partition in the year, 1980 and that an item of the property which was not included in the partition deed of the year, 1967 is also available for partition. They prayed that certain documents including the partition deed of the year, 1980 be set aside.

2. The counter claim was appropriately answered by the first respondent.

3. While so, petitioners filed I.A. Nos. 561 and 562 of 2012 to implead supplemental defendants 5 to 31 in the suit and requesting the Court to direct first respondent to amend the plaint accordingly. Those applications were objected by the first respondent and dismissed by the learned Sub Judge by the

impugned order.

4. It is contended by the learned counsel for petitioners/defendants 1 and 2 that in the nature of claim made in the counter claim, supplemental defendants 5 to 31 were required to be impleaded. Learned counsel submits that supplemental defendants 5 to 10 (sought to be impleaded) are alienees under respondents 2 and 3/defendants 3 and 4 and that supplemental defendants 11 to 31 (sought to be impleaded) are also entitled to share in the item of property sought to be additionally included in the suit and which according to the petitioners was left unpartitioned in the partition deed of the year, 1967.

5. Learned counsel for first respondent would contend that amendment is unnecessary and unwarranted. According to the learned counsel, first respondent is not interested in the item of property additionally sought to be incorporated in the plaint schedule and allegedly left unpartitioned in the partition deed of the year, 1967. It is further contended that in the written statement filed much before the additional written statement and counter claim, there is an admission about validity and binding nature of partition deed of the year, 1980. According to the learned counsel, petitioners cannot ask for impleadment of additional parties in the suit and direct amendment of plaint.

6. Question whether reliefs prayed for in the counter claim is allowable or not is not a matter to be decided while deciding I.A. Nos. 561 and 562 of 2012. For, it is settled that when considering an application for amendment the Court is not required to prejudge merit of the claim sought to be incorporated by such amendment. What is required to be decided is only whether amendment is necessary to settle the controversy between the parties.

7. According to the petitioners, as contended in the additional written statement and the counter claim, partition deed of the year, 1980 is not binding on them. It is by virtue of partition deed of the year, 1980 that first respondent has claimed 1/3 right over the suit property - 19> cents. The position may be different if contention of petitioners as regards binding nature of partition deed of the year, 1980 as against them is accepted. If that contention is accepted, then extent of property as claimed by the petitioners and available for partition on that account would be 41 cents. If that be the situation, assignees of respondents 2 and 3/defendants 3 and 4 are necessary parties to the litigation.

8. So far as supplemental defendants 11 to 31 are concerned, their impleadment is sought on the strength of the claim of petitioners that an item of property which they want to be introduced in the suit was left unpartitioned in the partition deed of the year, 1967. Whether any such property as claimed by the petitioners is available for partition is a matter which the trial court has to decide at the appropriate stage. Assuming that as contended by the first respondent he has no interest over the property said to be left unpartitioned since the counter claim also seeks partition, it is appropriate that all the property over which parties claim right are brought to the purview of the suit/counter claim as the

case may be.

9. In Rohit Singh and Others Vs. State of Bihar (Now State of Jharkhand) and Others, the Supreme Court has pointed out that though a counter claim is normally directed against the plaintiff in the suit, incidentally, other persons also can be made parties to it.

10. But, there is no reason why petitioners should be permitted to seek impleadment of supplemental defendants 5 to 31 in the suit or direct the 1st respondent to incorporate any additional item in the suit over which the first respondent is not claiming any right. As submitted by the learned counsel for petitioners, being a suit for partition, defendants also could be treated as in the position of plaintiffs. A counter claim is in the nature of a cross suit. Therefore, the appropriate course available for petitioners was to seek impleadment and consequential amendment of the counter claim rather than asking such relief so far as the plaint is concerned. Though I am not impressed by the grounds learned Sub Judge has stated for rejection of I.A. Nos. 561 and 562 of 2012, since I stated that the appropriate course was to seek impleadment and amendment of the counter claim as provided under the law, I do not find reason to interfere with the ultimate dismissal of I.A. Nos. 561 and 562 of 2012. But I make it clear that dismissal of I.A. Nos. 561 and 562 of 2012 though not for the reasons stated by the learned Sub Judge but, for the reason I have stated aforesaid, would not prevent petitioners from seeking appropriate reliefs so far as counter claim is concerned. In that view of the matter, I am not interfering with the ultimate dismissal of I.A. Nos. 561 and 562 of 2012.

Resultantly, this original petition is disposed of making it clear that dismissal of I.A. Nos. 561 and 562 of 2012 will be for the reason above stated and that it will not preclude petitioners from seeking impleadment and amendment of their counter claim as provided under the law and that if any such request is made, learned Sub Judge shall consider the request and pass appropriate orders as per law.