

(1960) 02 KL CK 0007
In the High Court Of Kerala
Case No : A.S. No. 501 of 1958

Abubacker and Another

APPELLANT

Vs

Abdulrahiman Beary and Others

RESPONDENT

Date of Decision : 12-02-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22

Citation : (1960) KLJ 472

Hon'ble Judges : T.K. Joseph, J;M.S. Menon, J

Bench : Division Bench

Advocate : T.N. Subramonia Iyer, S. Subramonia Iyer and P.R. Balachandran, for the Appellant; S. Subramonia Iyer and P.R. Balachandran, K. Kuttikrishna Menon K.N. Karunakaran and V.P. Gopalan Nambiar, P.C. Balakrishna Menon, for the Respondent

Judgement

Joseph, J.—This appeal is by defendants 3 and 4 in O.S. No. 65 of 1957 of the Subordinate Judge's Court, Kasaragod. The facts giving rise to the appeal may be briefly stated : The properties described in the plaint schedule belonged to Kadaprath Ahmed Beary and his wife, Jainaba. They had three sons, Abdulkader (deceased) and defendants 1 and 2. On 1-3-1950 the second defendant executed a usufructuary mortgage, Ext. A 1, for Rs. 5,000/- in favour of the plaintiffs in respect of one-third of the properties and he took back the properties on lease. A second mortgage was executed by him in favour of the plaintiffs on 18-4-1950. Abdulkader also executed two mortgages for one-third of the properties in favour of the plaintiffs of which the first was on 8-3-1950. He took the properties on lease from the plaintiffs. Abdulkader and the second defendant defaulted payment of rent and the plaintiffs sued for recovery of the same. There were three suits against Abdulkader for the rent of successive periods and two of those suits were pending on the date of this suit. The two suits filed against the second defendant had been decreed by that time. Notwithstanding the suits and the decrees, no amount was realised from the second defendant or Abdulkader. The first defendant took assignments of the shares of Abdulkader and the 2nd

defendant undertaking to pay the amounts due to the plaintiffs but he did not pay the same. Kadaprath Ahmed had other wives and children by them and the first defendant has taken assignment of the shares of some of them undertaking to pay the debts due from them to defendants 3 and 4. As the first defendant was taking the whole yield without paying the debts due to the plaintiffs or defendants 3 and 4, the plaintiffs sued for recovery of two-third of the properties covered by the mortgages executed by Abdulkader and the second defendant and they also prayed that such share be allowed to be recovered after partitioning the properties. Defendants 1 and 2 filed a joint written statement stating that the plaintiffs were not entitled to two-third of the properties but only to 5/24, as each of the mortgagors was entitled only to 5/48 of the properties as held by the decree in O.S. No. 17 of 1944, a suit for partition by some of the heirs of Ahmed. By a supplementary written statement they raised an additional contention that all the heirs of Kadaprath Ahmed had not been made parties to the suit and that the same was therefore liable to be dismissed. The third defendant remained ex parte. The fourth defendant filed a written statement stating that he was unaware of the mortgage and lease transactions relied on in the plaint. He further stated that some of the heirs of Ahmed had executed a simple mortgage in his favour on the basis of which he had obtained a decree in O.S. No. 545 of 1955 of the District Munsiff's Court, Hosdrug, and that he was entitled to recover the amount under the decree from the properties, charged thereunder. He also claimed to have obtained assignment of a mortgage deed executed by two of the heirs of Ahmed in respect of a property bearing number R.S. No. 33-5 of Chittari village. As regards the prayer for partition, his contentions were that he was not aware of the plaintiffs' right to claim partition and the extent of their share and that he had no objection to the partition of the properties subject to his rights. The defence contentions were overruled and the plaintiffs were given a decree as prayed for. Defendants 3 and 4 have jointly preferred this appeal from the decree while defendants 1 and 2 have preferred a memorandum of cross-objections, objecting to the decree granted to the plaintiffs.

2. Though the fourth defendant had limited his contentions to safeguarding recovery of the amount under the decree in O.S. No. 545 of 1955 and the mortgage right over R.S. No. 33-5, counsel for the appellants wanted to press all the points raised by defendants 1 & 2 in the suit. He contended that the plaintiffs were not entitled to recover anything more than 5/24 of the properties. The appellants cannot be allowed to raise this contention. The third defendant failed to file a written statement and the fourth defendant omitted to enter a specific denial of the claim made by the plaintiffs for recovery of two-third of the properties. His contention in paragraph 4 of the written statement was:

The defendant is not aware of the plaintiff's right to claim partition and the extent of his share. That the plaintiff ought to have filed a genealogy along with the plaint showing the various persons entitled to the property and the extent of the right of the various shares and the right which he claims. This defendant

therefore puts the plaintiff to strict proof of the right which he claims.

and in paragraph 12 he stated:

The defendant has no objection to the partition of the properties.

These statements cannot be taken as a specific denial of the material allegation in the plaint. Order VIII of the CPC requires denial of allegations in the plaint to be specific. Where a defendant simply "puts the plaintiff to proof of the several allegations in the plaint, he will be deemed to have admitted the facts alleged in the plaint" (See Mulla's Civil Procedure Code, 12th Edition, p. 624). In the absence of a specific denial, the appellants cannot be permitted to raise this contention.

3. Coming to the specific points raised by the fourth defendant in the written statement, the first is that the decree in this suit should not prejudicially affect his right to recover the amount under the decree in O.S. No. 545 of 1955. Although the third defendant remained ex parte, the fourth defendant had stated that the mortgage on the basis of which this decree was obtained was subject to an earlier mortgage in favour of the third defendant. The latter mortgage is admitted by the plaintiffs in the plaint. The plaintiffs-respondents agree that a provision may be made in the decree that this decree will not prejudice defendants 3 & 4 from recovering the respective amounts due to them by sale of the properties mortgage to them. In view of this, we direct that such a provision be made in the decree.

4. The other contention of the appellants relates to the mortgage right claimed by the fourth defendant in R.S. No. 33-5 of Chittari Village. The plaintiffs-respondents agree that this property may be excluded from the decree. The suit will therefore stand dismissed in respect of R.S. No. 33-5 of Chittari Village.

5. No other point arises from the written statement of the fourth defendant.

6. Defendants 1 and 2 (respondents 3 & 4) who did not choose to appeal from the decree have preferred a memorandum of cross-objections objecting to the decree granted to the plaintiffs. They want to question the decree without resorting to the normal procedure of preferring an appeal therefrom. The plaintiffs-respondents raised a preliminary objection that the memorandum of cross-objections which is directed solely against co-respondents and not the appellants was not maintainable under Order 41 Rule 22. Learned counsel for defendants 1 and 2 (Respondents 3 & 4) conceded that ordinarily a respondent would not be permitted to file cross-objections against a co-respondent. It was however urged that the rule was subject to exceptions under which this case would fall. Reliance was placed on certain passages in the judgment of Rajamannar C.J. in Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another, . In that case the question, whether a respondent might prefer cross-objection against a correspondent was referred to a Full Bench of five Judges in view of an earlier decision of a Full Bench of that court that he

could do so -- a view different from that of other High Courts in India which were all unanimously holding that such cross-objections were not sustainable except in exceptional cases. In the case referred to above it was held that the law was not correctly laid down by the earlier Full Bench in *Munisami Mudali v. Abbu Reddi* (38 Mad. 705). The passage relied on by respondents 3 & 4 is extracted below:

Notwithstanding the fact that the decision in *Munisami Mudali v. Abbu Reddi*, 38 Mad. 705; (A.I.R. (2) 1915 Mad. 648 F.B.) has stood for a very long time, I see no reason why our Court should not fall into line along with every other Court in India when one finds that the opinion expressed by the Full Bench in *Munisami Mudali v. Abbu Reddi*, 38 Mad. 705, (A.I.R. (2) 1915 Mad. 648 F.B.) is not supported by any reasoning, and when the language of O. 41, R. 22 on a proper construction confers only a restricted right on a respondent to prefer objections to the decree without filing a separate appeal. In my opinion, such an objection should, as a general rule, be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents.

Malik J. (as he then was), considered the question in *Mohamad Hasan v. Mohamad Hamid Hasan* (I.L.R. 1946 All. 317) and explained the exception in these terms:

So far as this Court is concerned, the law is now well-settled that as a general rule a respondent can file cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent.

This is the view held by this court also -- See *Raman Pillai Gopala Pillai v. Madhavan Pillai Ayyappan Pillai* (1958 KLT 846).

7. We are unable to hold that this is a case in which respondents 3 and 4 can be allowed to question the decree in favour of respondents 1 and 2 by way of cross-objections in the appeal preferred by defendants 3 and 4 which relates only to the safeguards to be made regarding their special rights. The mere fact that the appeal is from the decree in a suit for partition will not make the exception noted above applicable to this case. It cannot be said that the decree proceeds on a common ground or that the interest of the appellants is intermixed with that of these respondents. The memorandum of cross-objections must fail on this ground. The proper course for defendants 1 and 2 would have been to prefer an appeal but they failed to do so. It may also be observed that the second defendant (4th respondent) had no interest in the properties at the time of the suit, as he had already assigned his interest in favour of the 1st defendant (3rd respondent). So far as the third respondent is concerned, he took the assignment of the lease-hold interest of Abdulkader and the second defendant thereby accepting the position that the mortgage and lease covered two-third of the properties. He cannot now be permitted to contend that Abdulkader and the second defendant were not entitled to the shares mortgaged by them and taken

back on lease. The mortgage and lease transactions were after the decree in the suit for partition instituted by other heirs of Kadaprath Ahmed. Ext. A 3 is the deed under which Abdulkader assigned his share to the first defendant. It was specifically stated therein that it was one-third share of the properties that he was conveying under Ext. A3, that the same had been mortgaged by him and that the first defendant was in possession of the same. The first defendant accepted Ext. A3 and also a similar assignment deed from the second defendant. He cannot now be heard to say that the mortgages covered only 5/24 shares in the properties. Thus even if defendants 1 and 2 had preferred an appeal from the decree, their chance of success would have been extremely slender. In the circumstances of the sale they are not entitled to question the decree.

In the result, the decree of the court below will stand modified as follows:

The right of the third defendant to recover the amount under the mortgage deed dated 2-8-1947 and of the fourth defendant to recover the decree amount in O.S. No. 545 of 1955 of the District Munsiff's Court of Hosdrug will not be affected by the decree in this case and they will be at liberty to realise the amounts due to them under the transactions "mentioned above irrespective of this decree. R.S. No. 33-5 of Chittari Village in respect of which the fourth defendant holds the mortgage right under Ext. B5 will stand deleted from the decree and the rights of the fourth defendant under the said transaction will not be affected by this decree. Subject to these modifications, the decree of the court below is confirmed and the appeal and the memorandum of cross-objections are dismissed. The parties will bear their costs in this court. We wish to make it clear that if there are other heirs of Ahmed who are not parties to this suit and who still retain an interest in the property, they will not be affected by this decree.