
(2012) 03 KL CK 0244
In the High Court Of Kerala
Case No : O.P. (C) No. 893 of 2012

Anakkayam Puliyl Juma-Ath Palli

APPELLANT

Vs

V.P. Abdulla and Others

RESPONDENT

Date of Decision : 22-03-2012

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2012) 3 ILR (Ker) 470 : (2012) 2 KarLJ 394 : (2012) 2 KLJ 394

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : T. Krishnan Unni, Saju S.A., P.A. Sheeja, Meena A., K.C. Kiran and K. Shibili Nana, for the Appellant;

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—Challenge in the original petition is against Exts.P5 and P6 orders passed by the learned Sub Judge, Manjeri in the final decree proceedings of a suit for partition, numbered as O.S.No. 107/11. Petitioner, who was not a party to the suit applied for impleading him as an additional respondent in the final decree proceedings moving Ext.P3 application. He is a Mutawalli of a Jama-ath, a wakf registered under the Wakf Act. Advocate commissioner appointed by the court in the final decree proceedings in the above suit came to inspect the wakf property and attempted to take measurements over such property as if the same was included in the suit and covered by the preliminary decree, was the case canvassed for impleading him as an additional respondent in the above proceedings. He also moved another application as Ext.P4 to give directions to the advocate commissioner not to carry out measurement of the property till a decision is taken on Ext.P3 application for impleadment. The learned Sub Judge dismissed Ext.P3 application vide Ext.P5 order holding that the petitioner is not entitled to get impleaded in the final decree proceedings placing reliance on Ajitha Dubba Rajam v. Aitha Pochaiah, 2007(3) KLT SN 9 [C No. 10] SC. In view of the dismissal of Ext.P3 application

under Ext.P5 order, Ext.P4 application was also dismissed vide Ext.P6 order. Propriety, legality and correctness of Exts.P5 and P6 orders passed by the learned Sub Judge are challenged in this original petition invoking the visitorial jurisdiction vested with this court under Article 227 of the Constitution of India.

2. There is no legal bar as such in impleading a third party in the final decree proceedings, and, when an application is moved for such impleadment it has to be adjudged on its merits with reference to the right or claim canvassed by such party in relation to the subject matter involved in the suit and covered by the preliminary decree, is the submission of the learned Senior Counsel for the petitioner assailing Exts.P5 and P6 orders passed by the learned Sub Judge as improper and unsustainable. Adverting to the description of B schedule item No. 1 in Ext.P2, the preliminary decree passed in the suit, showing that such property is shown as a portion of "Panayipparambu", with reference to the description over one of the properties covered by Ext.P1 under which the wakf was constituted in favour of the Jama-ath, it is contended that over the property named as Panayipparambu, at least a portion thereof, a wakf had been constituted. When the petitioner has a case that under the ex parte preliminary decree, the attempt of the plaintiffs is to have a measurement of the wakf property impleadment of the petitioner to show that over the wakf property no such measurement could be carried upon on the basis of the preliminary decree and such decree shall not have any bearing on such property requires to be adjudicated in the final decree proceedings allowing the impleadment of the petitioner applied for, is the submission of the learned Senior Counsel. The learned counsel has also referred to the decisions rendered by this court in Ammini Ammal v. Krishnan & ors, 1978 KLT 80:: 1977 ICO 880 and Kochukunju Stephen Vs. Ashia Ummal, , with the former among them distinguishing an earlier decision in Vasudeva Kallurao v. Ramachandra Rao, 1977 KLT 414:: 1977 ICO 739 in which a view was taken that in the final decree proceedings no third party can be impleaded, to contend that where it is shown that the impleadment of a party is essential for proper adjudication of the questions involved in the suit, such impleadment even if not applied for before the passing of the preliminary decree, but only in the final decree proceedings that cannot be considered as decisive, and, a decision on such impleadment has to be taken based on the principles of justice and equity and also, the need to avoid multiplicity of suits. Exts.P5 and P6 orders passed by the learned Sub Judge are liable to be set aside, is the submission of the learned Senior Counsel.

3. The learned Sub Judge has dismissed Ext.P3 application for impleadment placing reliance on Ajitha Dubba Rajam v. Aitha Pochaiah, 2007(3) KLT SN 9 [C No. 9] SC. which, it is seen, was relied by the counsel for the applicant in the final decree proceedings to resist the application for impleadment moved by the petitioner. Though the short note of the decision reported is suffixed as if it was one rendered by the Apex Court, it appears to be one rendered by a single judge of the High court of Andhra. Going through that reported decision, which too in its abbreviated form, a short note, it is seen, the question that was considered

was whether a third party claim can be worked out in a final decree proceedings. The question whether a third party could seek an impleadment in final decree proceedings and if so, whether it is absolutely impermissible, or under what circumstances permissible, it is seen, was not the question that was considered in the above case. In fact some of the observations made in that decision that even if the ex parte decree passed against a party is not set aside, such party can obstruct delivery in the execution proceedings and file claim petition to substantiate the claim seeking an adjudication of her claim or even institute a suit for declaration to establish her right as the owner of the property, with due respect, cannot be taken as correct proposition of law with respect to the finality and conclusiveness of an ex parte decree, which is as good as a decree on merits. In the light of the observations reflected in the decision as stated above, and also that the question whether the impleadment of a third party as such in the final decree proceedings was not considered in that decision, as seen from the abbreviated form of the decision, the learned Sub Judge was not correct in placing reliance on that decision to decide the question of impleadment canvassed in Ext.P3 application in the final decree proceedings especially where this court had occasion to consider such question and lay down the principles applicable thereto, which are discussed hereunder. The crux of the issue arising for consideration is whether the petitioner, a third party, is entitled to seek his impleadment as an additional respondent in the final decree proceedings on the case canvassed by him that there was an attempt by the advocate commissioner deputed by the court to measure out a portion of the wakf property as if it is covered by the preliminary decree passed in the suit. He has no definite case that any portion of the wakf property of the Jama-ath of which he is stated to be the Mutawalli is covered by Ext.P2 preliminary decree in the suit. The question of impleadment of a third party to a suit whether it be after the passing of the preliminary decree or not emerges for consideration only if it is shown that he is a proper or necessary party. Though sub-rule (2) of Rule 10 of Order I of the CPC (for short "the Code") empowers the court to add a party at any stage of the proceedings none has an indefeasible right even if he be a proper or necessary party to insist for his impleadment without having regard to the stage at which the suit or proceeding is pending before the court. So far as the suit for partition is concerned partibility of the property is decided by passing the preliminary decree and once such preliminary decree is passed unless it is set aside in appropriate proceedings the decision taken on the partibility of the property is final. In the final decree proceedings what is to be followed is giving effect to the partition of the property as per the decision of the court as among the sharers by having measurement of such properties, settlement of accounts, adjustments etc. Of course, after passing of the preliminary decree where the death of a party takes place or there is an assignment of the right of one of the parties to another, substitution of the legal representatives as well as assignees, as the case may be, by way of impleadment can be permitted. But, in such cases, there is no reopening of the preliminary decree, but only protecting the interests of the persons whose rights have already been declared under the decision rendered in

the preliminary decree. In *Vasudeva Kallurao v. Ramachandra Rao*, 1977 KLT 414 dilating on the aspects involved over the impleadment of a party where it is sought for after the passing of the preliminary decree in a final decree proceedings, this court has held that when the questions sought to be projected by way of such impleadment cannot be considered without reopening the preliminary decree such impleadment cannot be allowed. Even if the person, who seeks such impleadment has interest in the subject matter of the litigation unless he seeks impleadment as a legal representative of the transferee of one of the parties to the suit in which the preliminary decree was passed, it is held, his impleadment in the final decree proceedings is not allowable as in such proceedings his rights cannot be determined without reopening the preliminary decree, and that cannot be done in such final decree proceedings. In *Ammini Ammal v. Krishnan & ors*, 1978 KLT 80 the above decision was distinguished taking note of the special circumstances involved in that case. The facts involved in that case would show that a female member of a Mithakshara joint family after passing of the preliminary decree moved for impleadment in the final decree proceedings as an additional defendant in the suit to claim her rights as a co-sharer along with her sons and husband. She was entitled to a share in the suit property and she was not made a party apparently because the plaintiffs believed that she has no right to claim a share in the family properties was taken note of by the court to hold that a person who ought to have been impleaded or whose presence is necessary for proper adjudication of all the questions involved in the suit has a right to be impleaded at any stage of the proceedings i.e., until the final decree is passed. Similarly, in *Kochukunju Stephen Vs. Ashia Ummal*, relied by the learned Senior Counsel, the facts are quite distinct and different. On the passing away of one of the parties to the suit (13th defendant), his widow and children were impleaded as additional defendants. On such impleadment of the legal representatives of a deceased defendant in the final decree proceedings, challenge being raised before this court in revision whether such legal representative brought in by way of substitution could canvass or set up any independent right in any of the items ordered to be partitioned under the preliminary decree, having regard to the facts and circumstances, this court held that they are entitled to raise their independent claims and to do so, the "preliminary decree may have to be reopened, if that course becomes necessary on the basis of their contentions based on independent title". Subsequently, the filial decree application was dismissed upholding the challenges raised by the additional defendants as they have prescribed title over the properties by adverse possession and limitation. Challenge against the dismissal of the application for final decree for the reasons as aforesaid arose for consideration in the above reported decision. This court repelled the challenge taking note that while ordering the impleadment of the additional defendants in the final decree proceedings they have been allowed to set up their independent claims also to resist the partition, for which, if necessary, the preliminary decree had also been directed to be reopened for considering that question. That was also a case where the parties who were brought in by way of substitution as legal heirs of

one of the parties to the suit had set up an independent claim over the items involved in the suit in respect of which preliminary decree had already been passed, and their right to canvass such a challenge, having regard to the facts of the case, was permitted to be raised in the final decree proceedings by the court with direction to have an adjudication thereof, if necessary, by reopening the preliminary decree. Facts situation presented in that case has no similarity or parallel to the one canvassed by the petitioner, who has set forth a case that he is not even certain whether the wakf property of the Jama-ath, to inspect which the advocate commissioner is alleged to have come, forms part of the subject matter involved in the preliminary decree passed in the suit. In this context, it is also quite relevant to take note of the bar of jurisdiction of the civil court in respect of any dispute, question or other matter relating to wakf property, which is required to be decided by the Tribunal constituted under the Wakf Act, 1995. Section 85 of the Wakf Act, 1995 reads thus:

Bar of jurisdiction of Civil Courts:-- No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other matter relating to any Wakf. Wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

In case any portion of the property covered by the preliminary decree passed in the suit is a wakf property as contended by the petitioner, Mutawalli of the Jama-ath, in view of the statutory interdiction barring the jurisdiction of the civil court as referred to above, I need not express any further opinion on the value or merit of such decree. At any rate, even on the admitted case of the petitioner to raise a dispute in the final decree proceedings that the preliminary decree covers a portion of the wakf property which, in view of the statutory interdiction cannot be gone into by the civil court, his impleadment as an additional respondent in such suit is impermissible. If the petitioner has got any such case, he has to work out his remedies in accordance with the statutory prescriptions to safeguard and protect the interests of the wakf property. In any view of the matter, challenge raised against Exts.P5 and P6 orders turning down the application for impleadment and also directions sought to be issued to the advocate commissioner does not suffer from any infirmity, leave alone any illegality, though for different reasons stated above, and interference with such orders is not called for in exercise of the supervisory jurisdiction vested with this court. Original petition is dismissed.