
(1988) 07 KL CK 0058
In the High Court Of Kerala
Case No : S.A. No. 869 of 1987

Govinda Pillai Chellappan Pillai

APPELLANT

Vs

Madhavan Pillai Balan and Others

RESPONDENT

Date of Decision : 22-07-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 50
Evidence Act, 1872 — Section 44
Income Tax Act, 1961 — Section 46(2)
Kerala Land Reforms Act, 1963 — Section 102, 125(1), 125(3), 72(c)

Citation : (1988) 2 KLJ 219

Hon'ble Judges : K.P. Radhakrishna Menon, J

Bench : Single Bench

Advocate : P. Sukumaran Nair, for the Appellant; P. Krishnamoorthy and B. Krishnamoni, for the Respondent

Final Decision : Allowed

Judgement

K.P. Radhakrishna Menon J.

1. Sri. P. Krishnamoorthi, advocate, takes notice on behalf of the respondents. The questions formulated in this Second Appeal reads:

A) Whether the first defendant has availed of the statutory remedy for setting aside Ext. A8 order and Ext. A2 certificate of purchase issued on the basis of the order and an adverse order Ext. A5 was passed in appeal inter parties is the first defendant entitled to challenge the validity of Ext. A8 and Ext. A2 in collateral proceedings.

B) When Ext. A8 order has merged in Ext. A2 order of the appellate Authority, is Ext. A8 order open to challenge as being vitiated by fraud and collusion?

C) Even if Ext. A2 certificate is bad in law, is not the plaintiff entitled to the smaller relief namely the declaration of his possession and permanent injunction as tenant under Ext. A17

D) Is the finding that Ext. A2 is void as being vitiated by fraud and collusion based on any relevant material? Is the finding sustainable in law and on the facts and circumstances of the case?

E) Is not the decree dismissing the suit without making a reference u/s 125(3) of the Kerala Land Reforms Act illegal and liable to be reversed

Facts relevant and essential to determine the question arising for consideration, briefly stated are: The suit property, a reclaimed coconut garden, originally belonged to one Cherian. On the death of Cherian, Cherian's brothers and relations made attempts to get hold of the assets Cherian had left behind. The second defendant, the son of Cherian and third defendant his widow were unable to resist the attempts of the relations of Cherian to get at the assets. The second defendant at that time was a minor. Circumstanced like this, the third defendant acting for self and as guardian of the second defendant on 10-9-1955 demised the suit property on lease to the plaintiff, her brother as is seen, from Ext. A1 lease deed. The Land Tribunal within whose jurisdiction the property is situated, initiated suo motu proceedings u/s 72 (c) of the Kerala Land Reforms Act for the assignment of the rights, title and interest of the landlord over the property to the cultivating tenant. The Land Tribunal after due enquiry passed Ext. A8 dated 26-4-1977 directing the assignment of the rights, title and interest of the landlord over the property in favour of the plaintiff. On the plaintiff depositing the purchase price on 7-6-1977 Ext. A2 certificate of purchase was issued to him on 3-6-1977.

2. In the meanwhile the first defendant had instituted suit, O.S. 144 of 1975 in the Sub Court, Quilon against defendants 2 and 3 for specific performance of an agreement said to have been executed by them in his favour to sell the suit property to him. That suit was transferred to the District Court and renumbered as O.S. 2 of 1977. Defendants 2 and 3 contested the suit. The said suit was dismissed on 8-7-1977. The first defendant filed A.S. 290 of 1977 before this court which was compromised between the parties and as a result of which defendants 2 and 3 agreed to sell the property to the first defendant for a price to be fixed by the court on the basis of the valuation made by a commissioner appointed for that purpose. Accordingly the price was fixed and a compromise petition was filed. A decree in terms of the compromise was passed on 5-12-1979.

3. The appellant who had in the meantime obtained the certificate of purchase dated 3-6-1977 came to know about the decree on 11-12-1980. He thereupon instituted the suit from which this Second Appeal arises. It is relevant in this context to note that the suit which had been instituted in the Munsiff's Court was found maintainable in the Munsiff's Court and as a result of which the same was returned for presentation before the Sub Court, Quilon. The plaint was taken back and represented in the Sub Court, Quilon where it was numbered as O.S. 205/72.

4. The first defendant contested the suit: His main contention was that the plaintiff was not a lessee, that the proceedings in which the certificate of purchase was issued were collusive and fraudulent and therefore the certificate of purchase was void and hence not enforceable in law. The suit therefore, it was contended, was liable to be dismissed. Pending suit the first defendant challenged Ext. A8 order of the Land Tribunal based on which Ext. A2 purchase certificate was issued in favour of the plaintiff, by filing an appeal before the Appellate Authority under Sec. 102 of the K.L.R. Act. That appeal, A. A. 4/81 (plaintiff and defendants 2 and 3 were impleaded as respondents 1 to 3 in that appeal) was filed out of time and therefore the first defendant had to file a petition to condone the delay in filing the appeal. The Appellate Authority After hearing the parties, dismissed the appeal by Ext. A5 order dated 13-8-1984. It is against the said order of the Appellate Authority the first defendant has filed C.R.P. 3270/84 which I have disposed of today by a separate order.

5. The courts below has found that inasmuch as Ext. A8 and Ext. A2 certificate of purchase were obtained by fraud and collusion, the plaintiff appellant was not entitled to the declaration and the consequential reliefs prayed for in the suit and as a result of which the suit was dismissed. Hence the second appeal.

6. That the courts below have not taken into account the significance of Ext. A5 while entering the finding that Exts.A8 and A2 were obtained by fraud and collusion and hence they are void and un enforceable in law, is beyond challenge. That by Ext. A5, the appeal filed by the first respondent challenging-Ext.A8 based on which Ext. A2 certificate of purchase was issued in favour of the appellant-plaintiff, has been dismissed by the Appellate Authority, is beyond dispute.

7 What then is the relevance of Ext. A5 in deciding the issue arising for consideration in this appeal? Ext. A8 must be deemed to have been merged in Ext. A3 and if that be so the concurrent finding that Ext. A8 was obtained by fraud and collusion is of no consequence, so far as the case of the plaintiff-appellant that Ext. A2 certificate has recognised his tenancy is concerned, the learned counsel for the appellant argues.

8. On the other hand, the learned counsel for the contesting respondents argues that it is unnecessary for the contesting respondents to challenge Ext. A5 invoking Section 44 of the Evidence Act because the Appellate Authority constituted under the K. L. R. Act cannot be said to have the power to decide cases in which orders are attacked on grounds of fraud or collusion. Yet another ground pressed into service by the learned counsel is that, a person who is not a party to the proceedings though aggrieved, within the meaning of Section 102 K.L.R. Act, may come to know of the order without notice to him, after a long delay and in such cases his right of appeal is subjected to an order condoning the delay by the Appellate Authority and if that be so, it is further argued, it cannot be said that such a person has a right of appeal. In support of these arguments, he relied on the ruling of this court, Velappan Vs. Thomas (1979 KLT 412).

9. I shall deal with the second ground first. The point that requires consideration in this regard is this: Could it be said that a person who is not a party to a proceeding, but at the same time aggrieved, within the meaning of Section 102, by the order passed therein, has a right of appeal to challenge that order? The learned Judge who considered the question in re Velappan no doubt has observed that such a person has no right of appeal. But a Division Bench of this court in K.S.E. Board vs. Cyriac Stephen (1981 KLT 804) has taken a different view. Here the appeal was accompanied by an application for leave to file an appeal and the question considered was; whether in such cases the party aggrieved can be said to have a right to file an appeal. After considering the various aspects of the case the Division Bench held:-

...such an appeal can be compared to an appeal filed out of time but without an application, to condone the delay accompanying it. On an application to condone the delay being filed subsequently and that application being allowed by the appellate court, the appeal becomes a proper appeal. So also on an application for leave to appeal being filed subsequently and on that being allowed, the appeal becomes one preferred on the date it was filed.

It was further observed:-

On granting leave and the permission the grant of leave to appeal relates back to the date of preferring the appeal or in other words, it is not an appeal preferred on the date leave therefor is granted but one filed when it was filed in accordance with other laws governing such appeals.

Holding so the Division Bench observed:

In view of what is said above, we do not think that the law has been correctly stated in Commissioner, Trichur Municipality vs. Narayanan Nair (1980 KLT 101)" wherein it has been stated thus:-

It is settled law that persons who are not parties to a proceeding but are aggrieved by the decree or order passed, can file an appeal questioning such order or decree after obtaining leave from the appellate court. In other words, while there is no right to file an appeal, the appellate court can grant leave to do so

(Emphasis supplied)

The observation in Velappan's case that the aggrieved party within the meaning of Section 102 has no right of appeal, cannot stand with the decision of the Division Bench. That means that the above observation of the learned Single Judge in re Velappan has no binding force. The content of Section 102 requires to be considered in this context. Sub-section 1 thereof gives an aggrieved person the right to file an appeal against the order which is likely to affect his rights prejudicially. Sub-section 2 provides that the Appellate Authority may admit an appeal presented after the expiration of the period prescribed under sub-section 1 if it is satisfied that the appellant had sufficient cause for not presenting, it

within the prescribed period. The plain and unambiguous language employed in these two sub-sections make it clear that the legislature intended that a person even if he is not a party to the proceeding but nevertheless aggrieved by an order passed by the authority under any of the provisions made mention of in sub-section 1 of Section 102, has a right to file an appeal against the said order. The second ground urged by the learned counsel therefore, is rejected.

10. The first ground pressed by the counsel namely, that, the Appellate Authority constituted under the K. L.R. Act cannot be said to have the power to decide cases in which the orders are attacked on the ground of fraud or collusion is apparently supported by the dictum in Velappan's case. The learned counsel for the appellant however, argues that the observations in the said ruling apparently supporting the above contentions, cannot be called the ratio decidendi because consideration of the issue based on the above ground was not necessary, to the decision of the actual issue between the parties. While considering these competing arguments a question would immediately arise and it is this: What was the real or actual issue, the court was called upon to decide in that case? A reference in this connection to the question posed by the learned Judge in re Velappan is relevant:-

This appeal raises an important question as to the bar of jurisdiction of the civil courts under the Kerala Land Reforms Act, from questioning the orders of the Land Tribunal.

Considering the various aspects of this question the learned Judge observed thus:-

The separate judgment of Kailsam J., lends support to the view that civil courts have, notwithstanding statutory ouster of jurisdiction in special statutes, jurisdiction to decide cases based on fraud or collusion.

From the above observation as also the question posed by the learned judge, it is clear that the question as to whether the Appellate Authority constituted under the K. L. R. Act has the power to decide cases in which the orders of the first authority is under - attack on ground of fraud or collusion, did not arise. That there was no need to consider this question but that happened to be considered because the counsel for the appellant in that case pressed for it is obvious from the following observations:

I had to refer to this aspect of the case Because the learned counsel for the appellant brought to my notice S.102 of the Land Reforms Act.

(Emphasis supplied)

That the said question in fact did not arise for consideration in the C.M. Appeal, is further clear from the conclusion, the learned Judge has arrived at. It reads:-

Now to wind up any discussion, the conclusion that I arrive at is that the ouster of jurisdiction of civil courts contained in S.125 (1) and (2) of the Act, does not

extend to questions relating to fraud and collusion. To reiterate what has been said before, most solemn proceedings can be vitiated if fraud and collusion are present. Both statutory and judicial recognition are available to this principle. To say that a Tribunal or statutory authority can hear a case involving fraud, to which fraud the authority itself is a party, is shocking to judicial conscience. To say that an order based on fraud or collusion cannot be challenged in civil court is to shake the foundation of our legal system. The Kerala Land Reforms Act cannot be deemed to lay down any such wide jurisdiction on the Land Tribunals. If the contention of the appellant's counsel is to be accepted one will have to hold that orders of Land Tribunals upholding tenancy even vitiated by fraud and collusion and orders by which purchaser certificates are issued, be it in the most unwholesome manner, are even above Article 141 of the Constitution of India. My considered opinion is that S. 44 of the Evidence Act contains in-built safeguards to salvage orders obtained by fraud and collusion. According to me, the validity of the order in O.A. No. 140 of 1978 can be questioned on the ground of collusion.

The Appellate Judge was right in directing the trial court to re-hear the matter.

(emphasis supplied)

The underlined sentence in the above extract may at best suggest that tribunal or a statutory authority is disabled to hear a case involving fraud to which the tribunal or the authority was a party. The Authority constituted under Sec. 102 cannot, however be equated with such a tribunal or authority-which in the scheme of the Act can only be the first authority-because it is an Appellate Authority. It therefore follows that the observation of the learned Judge relied on by the counsel to sustain the first ground referred to above can at most, be treated only, as obiter. A reference in this connection to the statement of Law By Chipman Gray in his treatise. "The Nature and Sources of The Law" Page 261, 2nd edition is profitable. The learned author says thus:-

In order that an opinion may have the weight of a precedent, two things must concur: it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is necessary for the decision of a particular case-in other words, it must not be obiter dictum.

(emphasis supplied)

Hut, at the same time, the discussion In the judgment would show that the above dictum is a deliberate expression of opinion given after consideration of the point clearly brought and argued before the learned Judge. This dictum therefore can be given greater weight than the casual expressions which courts may make in Judgments. (See Page 261, law in the making, Allen, 7th edition). But that does not mean that such dictum holds the field always. The discipline of our judicial hierarchy however, prompts us to uphold and apply even obiter dictum, if possible, when the issue apparently covered by the dictum, directly arises for consideration in cases subsequent to the decision. Keeping this

principle in view we shall attempt interpretation of sub-section 3 of Section 102. The sub-section reads:-

"In deciding appeals under sub-section 1, the appellate authority shall exercise all the powers which a Court has and follow the same procedure which a court follows in deciding appeals against the decree of an original court under the Code of Civil Procedure, 1908".

This sub-section states that in deciding the appeals filed under sub-sec. 1 the appellate authority has all the powers of a court and can follow the same procedure which a court would follow in deciding appeals against the decree of an original court under the Code of Civil Procedure, 1908. It is clear from the plain and unambiguous words that the legislature intended two things: In deciding appeals filed under sub-sec. 1, (1) the Appellate Authority shall exercise all the powers of a court and (2) it can follow the same procedure which a court would follow in deciding appeals against the decree of an original court. To put it shortly, the Appellate Authority while deciding the appeals filed under sub-sec. 1 can exercise all the powers, a civil court is empowered to exercise in deciding appeals against the decree of an original court under the Code. What then is a court? "In order to constitute a court, in the strict sense of the term, an essential condition is that the court should have...power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement". (See *Brajnandan Sinha Vs. Jyoti Narain*,). To put it differently, the pronouncement of a definitive judgment is considered the essential sine qua non of a court. The Appellate Authority functioning under Sec. 102 as already seen, has all the powers of a court and if that be the position, it has also the power to decide cases in which the order of the lower authority is attacked on the ground of fraud or collusion. I am fortified in this view by a decision of the Supreme Court in *Sahu Rajeshwar Nath Vs. Income Tax Officer, C-Ward, Meerut and Another*, where the Supreme Court, while construing a similar provision contained in the proviso to Section 46 (2) of The Indian Income Tax Act has held as follows:-

...It was however, conceded by Mr. Karkhanis that under S. 25 of the Partnership Act the partners are liable jointly and severally for satisfying all liabilities of the partnership firm and the appellant would have been liable for the income tax dues of the partnership if proper proceedings, for instance a suit, had been brought in a Civil Court against him by the Income Tax Authorities. The point taken by Mr. Karkhanis is that it was not open to the Collector in a proceeding u/s 46 (2) of the Act to recover from the appellant the income - tax dues from the partnership. We are unable to accede to this argument. The proviso to Section 46 (2) of the Act states that the Collector shall, without prejudice to any other powers in that behalf "for the purpose of recovering the said amount, have the powers which under the CPC 1908 (V of 1908) a Civil Court has for the purpose of the recovery of an amount due under a decree. Reference should be made in this context to Order 21, Rule 50 of the Civil Procedure Code...

(emphasis supplied)

The Supreme Court thus found power in the Collector to proceed against the partners and recover the tax due, by a firm from the partners by invoking the provisions contained in Order 21 Rule 50 C. P. C. The above obiter dictum of this court cannot, in my view, stand with the dicta discernible from the above two decisions of the Supreme Court. The contesting respondent therefore cannot press the said dictum in re Velappan into service to sustain his plea that the Appellate Authority has no jurisdiction to decide a case in which the order is attacked on the ground of fraud or collusion. Ext. A5 therefore is a valid order.

11. Now I shall deal with the main question and it is this: Could it be said that the proceedings Ext. A8 based on which Ext. A2 certificate was issued, has got merged in Ext. A5? Ext. A5 is already noted, is the judgment of the Appellate Court dismissing the appeal. That the principles of merger has been extended to other proceedings like revisions and even to proceedings before quasi judicial and executive authorities is no more a moot point in view of the decision of the Supreme Court in Gojer Bros. (Pvt.) Ltd. Vs. Shri Ratan Lal Singh, . The Supreme Court after reviewing the earlier decisions in Commissioner of Income Tax, Bombay Vs. Amritlal Bhogilal and Co., , Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd., , Madan Gopal Rungta Vs. Secretary to The Government of Orissa, , Somnath Sahu Vs. The State of Orissa and Others, , Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatreya Bapat, , State of U.P. v. Mohammad Nooh (A. I R. 1958 SC 86) and State of Madras Vs. Madurai Mills Co., Ltd., held thus:-

The fundamental reason of the rule that where there has been an appeal, the decree to be executed is the decree of the appellate court is that in such cases the decree of the trial court is merged in the decree of the appellate court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit, came to be gradually extended to other proceedings like revisions and even to proceedings before quasi judicial and executive authorities

(emphasis supplied)

12. The above position notwithstanding, the learned counsel for the first respondent, relying on the principles enunciated by the Supreme Court in Mohammad Nooh and Madurai Mills Co. Ltd.'s contended that there was no merger of Ext. A8 in Ext. A5 and therefore there was no need for the contesting defendants to challenge the validity of the said order in order to sustain their case It is true that the Supreme Court in the said rulings has observed that the application of the merger principle depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction. In the light of my findings that the Appellate Authority u/s 102 is discharging the functions of a "Court" there is no need for us to consider the correctness of the argument of the learned counsel

based on the above observation of the Supreme Court. Nevertheless I shall make a reference to the observations of the Supreme Court in the later decision in East India Commercial Co. Ltd., a case. Relevant portion therefrom is extracted hereunder:-

...It is obvious that when an appeal is made, the appellate authority can do one of three things, namely, (i) it may reverse the order under appeal, (ii) it may modify that order, and (iii) it may merely dismiss the appeal and thus confirm the order without any modification. It is not disputed that in the first two cases where the order of the original authority is either reversed or modified it is the order of the appellate authority which is the operative order and if the High Court has no jurisdiction to issue a writ to the appellate authority it cannot issue a writ to the original authority... It seems to us that on principle it is difficult to draw a distinction between the first two kinds of orders passed by the appellate authority and the third kind of order passed by it. In all these three cases after the appellate authority has disposed of the appeal, the operative order is the order of the appellate authority whether it has reversed the original order or modified it or confirmed it.

The cumulative effect of the above observation as also the observations made in Gojer Brothers (extracted above) is it cannot but be said that the order which affects the rights of the parties is the order passed by the appellate authority. To short the operative order is only the order of the appellate authority and not the order of the first authority. Ext. A5, in the light of the principles enunciated hereinbefore, is the operative order and, in as much as the contesting defendants have not challenged the validity of the said order, they are bound by it. The order, Ext. A8 in the circumstances does not exist at the relevant time for being challenged because it had got merged in Ext. A5. That Ext. A5 had been produced in the suit before it was heard and disposed of, is beyond dispute. If that be so, the steps taken by the contesting defendants to get a declaration that Ext. A8 was obtained by fraud and collusion are nothing but an exercise in futility. In the light of Ext. A5 the plaintiff is entitled to the declaration prayed for. But in view of the fact that Ext. A5 stands set aside by my order disposing of the C.R.P. 3270 of 1984 I, heard along with the appeal, it has become necessary to issue the following directions while allowing the appeal. It should in this connection be noted that in the light of the principles enunciated in this judgment, the question whether Ext. A3 was obtained by fraud and collusion can be considered and disposed of by the Appellate Authority constituted u/s 102 K.L.R. Act. To this extend, in ray judgment, there is exclusion of jurisdiction of the Civil Court: else there is the likelihood of having conflicting decisions. It that be so, the suit requires to be remanded to the trial court for fresh disposal. The trial court is directed to dispose of the suit taking into account the verdict of the Appellate Authority in the appeal where Ext. A8 is challenged on the ground of fraud and collusion. The trial court, if necessary, can adjourn the hearing of the suit from time to time awaiting the verdict of the Appellate Authority.

The appeal accordingly is allowed and the suit is remanded for fresh disposal. The parties, if so advised can produce fresh evidence. The trial court while disposing of the suit, shall take into account the observations and directions contained in this judgment.