

(1973) 09 KL CK 0008
In the High Court Of Kerala
Case No : C.R.P. No. 1604 of 1972

Kallianikutty Amma

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 20-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1974 Ker 171

Hon'ble Judges : K. Bhaskaran, J

Bench : Single Bench

Advocate : P.K. Kesavan Nair and K.N. Narayana Pillai, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

K. Bhaskaran, J.—This is a revision by the petitioner in I. A. Nos. 4299 and 4300 of 1970 in L. A. No. 42 of 1967 on the file of the Subordinate Judge's Court, Ernakulam. I A. No. 4299 of 1970 was one for condoning the delay in filing I. A. No. 430C of 1970 which is a petition for restoration of L. A. No. 42 of 1967 which was dismissed for default on 22-6-1970.

2. The court below dismissed both the petitions; hence this revision. The learned Counsel for the revision petitioner submits that L. A. No. 42 of 1967 was one of the many land acquisition reference cases arising out of acquisition of land for the Cochin Division of F. A. C. T., awaiting enquiry, and that the petitioner as well as her agent were under the bona fide belief that this case would come for evidence and enquiry along with the other reference cases only. In fact, it is averred, a petition was filed by petitioner's counsel for trial of L. A. No. 42 of 1967 along with L. A. No. 41 of 1967 in which he was appearing. No order rejecting the petition was, according to the petitioner, pronounced on 22-6-1970, on which date the petition for joint trial was made. However, contrary to the hopes and belief of the petitioner's counsel, L. A. No. 42 of 1967 happened to be called and dismissed on 22-6-1970 itself which fact the petitioner was not aware

of till 24-12-1970. The clerk of the petitioner's advocate noticed the mistake on 20-12-1970 and. reported it to her on 24-12-1970, and that is how she came to know about the dismissal of the reference. It is further submitted that all parties concerned had taken it for granted that L. A. No. 42 of 1967 also was included in the series of cases, numbering about one thousand, for joint trial, so much so that even the Government had taken it for granted that enhancement of compensation, as in the case of other connected reference cases, was ordered in L. A. No. 42 of 1967 also, and on that assumption a notice to receive compensation at the enhanced rate was, as a matter of fact, issued to the petitioner, not knowing that in this particular case no enhancement was ordered, but it was dismissed for default.

3. Mr. Augustine, the learned Government Pleader, has raised a preliminary objection to the maintainability of the civil revision petition. His contention is that by virtue of Section 59 of the Kerala Land Acquisition Act, the procedure prescribed by the Code of Civil Procedure, as far as be, has been made applicable to proceeding under the Land Acquisition Act, and the dismissal of I. A. No. 4299 of 1970 inasmuch as it is an order on an application filed under O. IX, Rule 9, Civil Procedure Code, it is appealable, no revision could be maintained, and an appeal alone should have been filed. It is also pointed out that u/s 106, CPC where an appeal from an order is allowed, it shall lie to the Court to which an appeal would lie from the decree in the suit in which such an order was made. It is also argued that it is because of this enabling provision to file an appeal that the Full Bench of this Court in P.D. Palakattumala Devaswom and Others Vs. Ulahannan Pylee, Kanjirakkuzhiyil Alapuram and Others, took the view that an appeal lies to the High Court from orders of references made under the Land Acquisition Act. According to the learned Counsel the provisions contained in Order XLIII, Rule 1 (c), CPC are attracted to the facts of this case.

4. The learned Counsel appearing for the revision petitioner submits that reliance by the learned Government Pleader on the Full Bench decision of this Court in 1969 Ker LT 275 is rather misplaced, as the Full Bench made a distinction between the "proceedings" on the one hand and the "suit" on the other. In the absence of specific provision in the Act conferring the substantive right of appeal, the appeal has to be filed in the High Court irrespective of the valuation of the subject-matter. What is to be underlined, according to the learned Counsel, is that the provisions of Section 141 of the Code of Civil Procedure, cannot be applied except to procedural matters, and it cannot be invoked in cases where the right of appeal is a substantive right conferred specifically by a statute. An appeal could arise only from such orders as are made appealable specifically by the statute, and that cannot be extended to other orders that may be passed in the course of the enquiry during the pendency of the proceedings in which such appealable order is passed. The proceeding under the provisions of the Land Acquisition Act arising out of references u/s 20 are to be deemed to be proceedings of a civil nature as referred to in the Full Bench decision of this Court in 1969 K LT 275 . The Madras High Court had occasion in Venkata Reddi and

Others Vs. Ventrapragada Ramabrahmam and Another, to consider the scope of the application of Order XLIII, Rule 1 (a) of the CPC with respect to orders passed u/s 19 of the Madras Agriculturists' Relief Act. There the contention was that Section 25-A of the Act was wide enough to authorise an appeal against an order u/s 19 for presentation to the proper Court on the ground of want of jurisdiction in the court to which it is presented. In the said case Raghava Rao, J., held-

"..... The interpretation to be placed upon the language in Order 43, R. 1 (a) is, in my opinion, this namely, that if under Order 7, Rule 10 an order for the return of a plaint has been made, that will certainly be appealable. I am inclined to think that the right of appeal under that provision cannot stand attracted to orders made in connection with matters other than suits or plaints merely because of Section 141, Civil P. C. which can only imply and involve that the mode of trial laid down by the Code in regard to suits will be available in the case of all original petitions as well. "

The Calcutta High Court had occasion to consider the applicability of the provisions contained in Order XLIII, Rule 1 (c) while dealing with the question whether an order on a petition for setting aside an order passed u/s 26-F of the Bengal Tenancy Act (Act 8 of 1885) is appealable. After referring to the scope of Section 141 and Order IX, Rule 9, Civil Procedure Code, Harries, C. J., held:-- Birendra Nath Biswas Vs. Monorama Devi and Others, -

"(8) It is to be observed that Sec. 141 speaks of procedure. What is made applicable to all proceedings in a Court of Civil jurisdiction is the procedure provided in the Code with regard to suits. Now, a right of appeal is admittedly a substantive right and not a procedural right. Section 141 does not deal with substantive rights and therefore Courts have held that though Order 9, Rule 9 is made applicable to applications other than suits no appeal would lie from a dismissal of such an application under Order 43, Rule 1."

In yet another decision of the Calcutta High Court in Habibar Rahaman Vs. Saidannessa Bibi and Another, , a Division Bench consisting of Mookerjee, J., and Pan-ton, J., has held as follows:

"It is well settled in this Court that mutawallis may be authorised to execute leases of this description, by the District Judge, who, for this purpose, is competent to discharge the functions of a Khazi under the Mahomedan law. The nature of the proceedings was considered in Fakhrunnessa Begum v. District Judge of 24 Parganas ILR 1920) Cal 592) : AIR 1920 Cal 129, where it was pointed out that the proceeding is not a suit but merely a proceeding governed by Section 141 of the Civil P. C. The fact that the provisions of the CPC regulate the proceedings does not make the order which may be passed therein appealable"

In Gaja Vs. Mohd. Farukh and Others, the observation of J. D. Sharma, J. is as follows:

".....An appeal is a substantive right and not a mere matter of procedure and unless it is conferred by Order 43, Civil P. C., it cannot be inferred by implication from Section 141 of the Code. Order 43 does not provide for an appeal from an order dismissing for default an application for restoration of an application under Order 9, Rules 9 and 13, Civil P. C. No appeal therefore lay from the order of the Munsiff dismissing the application dated 3rd September, 1956." No doubt, this case decided by the Allahabad High Court was one of dismissal of an application for restoration of an application for setting aside the ex parte decree. In such matters also, even though Section 141, Civil P. C. would govern the procedure, that would not necessarily mean that a right of appeal is available to the aggrieved party.

5. Considering the scheme of the Land Acquisition Act it does not appear to be the intention of the legislature to confer a right on the party aggrieved by an order of dismissal of a petition for restoration of a proceeding to file an appeal from such an order. As has already been said, the enabling provision, namely Section 141, Civil P. C, which has relation only to procedural matters, cannot be stretched to govern substantive right of appeal which has been or has to be specifically conferred by the special statute like the Land Acquisition Act, as in the present case. I am, therefore, of the view that an appeal does not lie from an order dismissing an application for restoration of a reference under the Land Acquisition Act dismissed for default and therefore the revision is competent.

6. As the dismissal for default appears to have arisen out of a bona fide mistake concerning the order that was passed on an application for joint trial of L. A. No. 42 of 1967 along with L. A. No. 41 of 1967, in the context that the Court had already conceived the idea of having a joint trial with respect to all the references relating to the acquisition of land for the Cochin Division of F. A. C. T., I think, the party should not be subjected to undue hardship. Even the conduct of the Government lends support to the pleading of bona fide belief urged by the revision petitioner. There is nothing to show that the revision petitioner was aware of the dismissal of the reference case before 24-12-1970, and thereafter there had not been any laches on the part of the petitioner in moving for the restoration of the case. I, therefore, hold that the Court below was wrong in not condoning the delay for which reasonable explanation has been offered, and in not allowing the petition for restoration of the reference.

In the result, the revision is allowed and the Court below is directed to restore the reference to file and dispose of the matter as expeditiously as possible. In the circumstances of the case there will be no order as to costs,