
(1963) 01 KL CK 0031
In the High Court Of Kerala
Case No : S.A. No. 61 of 1959

Kaveri Amma

APPELLANT

Vs

Sarada

RESPONDENT

Date of Decision : 16-01-1963

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 22 Rule 4, Order 34 Rule 1

Citation : (1963) KLJ 554

Hon'ble Judges : P. Govindan Nair, J

Bench : Single Bench

Advocate : S. Bhoothalinga Iyer, for the Appellant; P. Vasu, for the Respondent

Final Decision : Allowed

Judgement

P. Govindan Nair, J.—The question that arises for decision in this appeal is whether the suit out of which this appeal has arisen has abated by the non impleading of the legal representatives of the fourth defendant who admittedly died pending proceedings in the trial court. Notwithstanding the death of the fourth defendant and despite the fact that his legal representatives were not brought on record, the trial court purported to pass a decree against the first and fourth defendants for redemption of the mortgage which was sought to be redeemed in the suit. This decree, the relevant portion of which is extracted below:

clearly indicates that an indivisible and joint decree has been passed against two defendants who were supposed to have been on the party array when the decree was passed. On objection being raised, when execution was sought to be taken out by the decree-holder, by the legal representatives of the fourth defendant, it has been held that no execution can be had against the fourth defendant's interests in the mortgage security. A fresh attempt is now being made to execute the decree as against the first defendant. The first defendant contended that the decree being not executable against the fourth defendant, it is also not executable against the first defendant. This contention has been negated by

the execution court as also by the lower appellate court in appeal, and the complaint before me by counsel for the appellant-first defendant is that the view taken by the courts below is erroneous. I am inclined to accept this contention for reasons to be stated presently. In a suit for redemption of a mortgage, I consider that a sub-mortgagee, who admittedly was in possession of at least some of the properties mortgaged is a necessary and essential party. Without such a sub-mortgagee on the party array, the frame of the suit will not be proper and no effective decree can be passed by the court in such a proceeding. In such cases, it is settled law that notwithstanding the provisions of Rule 9 of Order 1, the suit has to be dismissed, if objection is taken that the suit is not properly constituted. Rule 1 of Order XXXIV lays down that in every action on a mortgage, all persons interested in the mortgaged property, should be made parties. This rule is imperative and is not contended to be otherwise. And Ghose on "The Law of Mortgage in India" at page 608 has enunciated the same principle that a sub-mortgagee who is interested in the mortgaged property is a necessary party in an action for redemption of the mortgage. This being so, I think the principle which has been stated in a number of decisions which have been collected by Chitaley in his commentaries to the CPC under Note 23 to Rule 4 of Order XXII should apply. The principle is so stated:

Where the absence of the legal representatives of the deceased from the record renders it impossible to proceed with the suit or appeal as against the rest, the suit or appeal will fail in toto.

2. Further, the decree that has been passed in this case is joint and indivisible, the non-impleading of the legal representatives of the deceased defendant will result in total failure of the suit or appeal. The same result must follow though the court purported to pass a decree, as in this case, apparently without noticing that the fourth defendant had died.

3. I am not impressed by the argument of counsel for the respondent that the abatement, if any, in this case is only so far as the fourth defendant and his interest in the property is concerned and the decree can be executed against the first defendant. He pointed out that the prayer in the execution petition is only for recovery of such of the items as are in the possession of the first defendant and that the decree holder having thus limited the prayer in the execution petition, there is no impediment to that prayer being granted. I am unable to agree. The question as to whether the decree is capable of execution cannot depend on the wording of the prayers in the Execution Petition.

4. In the result, the appeal has to be allowed with costs, and I order accordingly. Counsel for the respondent prays that a certificate that the case is a fit one for appeal may be granted. I think this prayer should be granted and I, therefore, certify that this is a fit case for appeal.