(2007) 01 KL CK 0073

In the High Court Of Kerala

Case No : RP No. 454 of 2001 in A.S. No. 473 of 1992

K.J. Preetha APPELLANT

Vs

U.K. Shyamalavally RESPONDENT

Date of Decision : 04-01-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1, Order 47 Rule 1(2)

Citation : (2007) 01 KL CK 0073

Hon'ble Judges : K.R. Udayabhanu, J;K.A. Abdul Gafoor, J

Bench : Division Bench

Advocate : S.V. Balakrishna Iyer, for the Appellant; P.N. Krishnankutty Achan (Sr.), for the Respondent

Judgement

K.R. Udayabhanu, J.—The appellant/plaintiff in A.S. No .473 of 1992/O.S. No. 143 of 1989 is the review petitioner who has sought for getting the judgment of this Court in the A.S. revised as this Court in the judgment allowing the plea for partition of the plaint schedule properties upholding the case of the petitioner that the Will on the basis of which the petitioner was sought to be disinherited is forged, inadvertently held that the petitioner is not entitled to get item No. 2 of the plaint schedule properties partitioned and also omitted to consider the plea of the petitioner that items 4 and 5 are liable to be partitioned. The court has also omitted to provide the share of profits to which the petitioner is lawfully entitled. The above constituted error apparent on the face of the record and mistake committed unwittingly.

2. The respondents have strongly opposed the application pointing out that there is a specific finding by this Court that the petitioner is not entitled to any share in plaint A schedule item No. 2 and that the same can be set right only in appellate proceedings. It was further contended that the respondents had taken up the matter before the Supreme Court vide SLP filed and the SLP was dismissed after issuing notice to the petitioner herein and hence there is merger of the decree of this Court with the order of the Apex Court and hence the proceedings cannot be

upset by filing a review petition before this Court.

3. On an examination of the respective contentions of the parties and the judgments of the court below as well as that of this Court, we find that virtually the only case set up against the plea of the petitioner who is the widow of the deceased Rajeevan who is the son of the first defendant and the brother of the rest of the defendants, is that the deceased Rajeevan had left a testament as per which he had bequeathed the items of properties sought to be partitioned to his legal heirs including the petitioner, his wife, although only a minor negligible share was left in the above Will to the petitioner. It is the case of the respondents/defendants that the deceased and the petitioner/wife was not in good terms and that she was living separately and hence he disposed of the properties as per the above Will. It is also pointed out that the deceased and the petitioner was not having children. It is seen from the evidence and discussions that the deceased was addicted to alcohol and on account of the above reason the petitioner and the deceased used to quarrel frequently and the petitioner practically left the company of the deceased. The deceased Rajeevan died very young at the age of 28. The case of the petitioner that the Will is a forged one was rejected by the trial court, but upheld by this Court vide a detailed judgment. It is as per the above Will dated 15-12-1988 (Rajeevan died on 29-12-1988 and the petitioner and Rajeevan got married in 1987) that the entire pliant A schedule items were bequeathed to the respondents, i.e. his mother, brothers and sister and provided only half share in item No. 3 in D schedule movables and directed to deposit Rs.25,000/- in a Bank and to pay its interest to the petitioner for three years or until she remarries. All the items of plaint A schedule is covered by the above Will. Item Nos. 1 to 3 of plaint A schedule are items 1 to 2 and 6 of Ext.A1 Will executed by the deceased father of Rajeevan bequeathing the above items to Rajeevan and his brothers and sister who are defendants 2 to 6. Item 4 was acquired by Rajeevan and his brothers and sister and his mother vide registered document No. 9/5/1972 and item No. 5 was obtained jointly by Rajeevan, his sister (defendant No. 2) and one brother (defendant No. 3) by registered document dated 16-8- 1977.

4. It is the case of the petitioner that this Court after holding that the Will is a forged one, under some misapprehension held that item No. 2 is not partible. The court did not at all consider the plea of partibility of items 4 and 5. When the court held that the Will is a forged one, the same should have ensued as an essential consequence that the above items are also liable to be partitioned and a preliminary decree should have followed in the above terms as a logical corollary. It is without mentioning any reasons, the court has observed that item No. 2 is not liable to be partitioned. There is no mention at all about items 4 and 5. So also the plea for share of profits was also not considered.

5. So far as the entitlement of the petitioner to get item Nos. 2,4 and 5 partitioned and also for share profits, counsel for the respondents has raised no contentions at all. It is his assertion that the court has held that item No. 2 is not

partible and hence the same can be corrected only in appellate proceedings. We find that the above stance the counsel for the respondents cannot be countenanced as review vide Order XLVII of the CPC is provided for exactly the same purpose, i.e., for correcting the mistakes or omissions committed by the Court that pronounced the judgment. Order XLVII Rule 1 specifically provides for the above contingency, "...on account of some mistake or error apparent on the face of the record or for any other sufficient reasons". We find that the observation in the judgment of this Court that item No. 2 of plaint A schedule properties is not partible and that the same is not included in Ext.A1 Will (of the father of deceased Rajeevan) is a definite and clear mistake and the court has made such an observation evidently under some misapprehension. So far as items Nos. 4 and 5 and the claim for share of profits are concerned, the same was not considered at all and the same is an omission and is the result of a mistake. So far as item No. 2 is concerned, the finding is unmistakeably an error apparent on the face of the record. Hence, we find that Order XLVII Rule 1 C.P.C. is squarely attracted in the instant case.

6. As we have already mentioned above, the major contention of the counsel for the respondents is relating to merger of the order of this Court with the order of the Supreme Court in dismissing the S.L.P.filed by the respondents. Counsel for the petitioner has strongly refuted the above contention. He has produced the order sheet of the Supreme Court in the SLP filed. It is seen that the court after hearing the counsel for the respondents before this Court ordered "issue notice confined to the question of settlement". Subsequent order of the Court after hearing counsel is: "A counter affidavit has been filed wherein the respondent has declined to have any settlement with the petitioners. In that view of the matter, the SLP is dismissed". According to the counsel for the petitioner, in such a situation the doctrine of merger has no application at all. He has relied on the decision of the Supreme Court in Kunhayammed and Others Vs. State of Kerala and Another, wherein the Court had considered the entire case law on the point and summed up the conclusions as follows:

i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

ii)The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the SLP is converted into an appeal.

iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

v) If the order refusing leave to appeal is a speaking order, i.e.gives reasons for refusing the grant of leave, then the order has two implications. Firstly the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the SLP or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by Sub-rule (1) of Rule 1 of Order 47 CPC.

7. On the other hand, counsel for the respondents has relied on the decision reported in Abbai Maligai Partnership Firm and Another Vs. K. Santhakumaran and Others, and Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others, . We find that both the above decisions have been considered by the top court in Kunhayammed''s case (op.cit). The court has rather disapproved the decision in Sree Narayana Dharmasanghom Trust case (op.cit); and the principles enunciated was found in tune with the fact situation in Abbai Maligai partnership Firms case (op.cit). In the circumstances, we find that the contention of the counsel for the respondents is devoid of merits and is liable to be rejected.

8. We find that the finding that item No. 2 of plaint A schedule is not liable to be partitioned is the result of misapprehension and is liable to be set right and the

omission of items 4 and 5 and share of profits is also liable to be corrected in exercise of the power under Order XLVII Rule 1 CPC. Counsel for the petitioner has submitted that so far as item Nos. 4 and 5 and the share of profits from the above items are concerned, the same may be relegated to the trial court. We do so. In the result, the preliminary decree passed by this Court in A.S. No. 473/1992 is enlarged by declaring that the plaintiff/petitioner is entitled to 1/12 share in plaint A schedule item No. 2 as well and that the petitioner/plaintiff is entitled to share of profits of the above items as pleaded. The petitioner may apply before the court below for a fresh preliminary decree with respect to items 4 and 5 and the court below shall dispose of the same without delay. The review petition is disposed of accordingly.

