
(1961) 09 KL CK 0009
In the High Court Of Kerala
Case No : S.A. No. 360 of 1958

Kunhi Mammad

APPELLANT

Vs

Ibrayankutty and Others

RESPONDENT

Date of Decision : 11-09-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1(u), Order 41 Rule 23, 105, 105(2), 97

Citation : (1961) KLJ 1367

Hon'ble Judges : S. Velu Pillai, J

Bench : Single Bench

Advocate : V.P. Gopalan Nambiar, for the Appellant; N. Sundara Iyer, for Respondents 1 and 6 to 19 and T. Karunakaran Nambiar, for Respondents 2 to 5, for the Respondent

Final Decision : Allowed

Judgement

Velu Pillai, J.—This appeal is by the 1st defendant and is directed against a preliminary decree for partition in a Mopla Marumakkathayam tarwad. At first, the trial court passed a preliminary decree for partition under the Marumakkathayam Law, but on an appeal against it, the Subordinate Judge of Tellicherry following the decision of Basheer Ahmed Sayeed J. in Mukkattumbrath Ayisumma v. Vayyaprath Pazhae Bangalavil Mayomoothy Umma (66 LW 19) held thus:

It follows, therefore, that the property, the subject matter of the suit, ought to be partitioned in accordance with the Islamic Law and not under the Marumakkathayam system of law.....In view of the later decisions cited above, there is no point in doubting that the Muslims in these parts shall be governed by the Islamic law, with the advent of the Shariat Act. In this view the suit has to go down to the trial court for a disposal afresh partitioning the properties in accordance with the Islamic law.

Accordingly, the preliminary decree was set aside and the case remanded.

Against this, no appeal was preferred. After the date of the remand order, a Division Bench of the Madras High Court in Puthiya Purayil Abdurahiman Karnavan v. Thayath Kancheentavida Ayoomma (A. I. R. 1956 Mad 244) had, in effect, overruled the decision, of Basheer Ahmed Syeed J. Following this Bench decision, the trial court once more passed a preliminary decree for partition in accordance with the Marumakkathayam Law, and an appeal taken against it was confirmed by the District Judge of Tellicherry. Hence this Second Appeal. The chief contention pressed was, that the remand order not having been appealed from had become final, that it was not therefore open to the first court to pass a decree for partition under the Marumakkathayam law and that the District Judge erred in confirming that decree on appeal. I see great force in this contention. Section 105 sub-section (2) of the CPC provides that:

Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

The order of remand came within the scope of Order XLI, Rule 23, C.P.C. as it was in force at the time in the State of Madras, and was appealable under Order XIII, Rule 1(u). This is sufficient to attract the operation of Section 105(2) quoted above. The Supreme Court had to consider the effect of section 105(2) in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, where it remarked, as follows:

A special provision was made as regards orders of remand and that was to the effect that if an appeal lay and still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand, the correctness thereof could be challenged by an appeal from the final decision as in the case of other interlocutory orders.

In a case u/s 97 C. P. C., which provides, that where no appeal is preferred against a preliminary decree the aggrieved party is precluded from disputing its correctness in the final decree and which employs almost similar phraseology, the Supreme Court in Kaushalya Devi and Others Vs. Baijnath Sayal and Others, observed :

In such a case an appeal against the final decree would inevitably be limited to the points arising from the proceedings taken subsequent to the preliminary decree and the same would be dealt with on the basis that the preliminary decree was correct and is beyond challenge..... The whole object which section 97 intends to achieve would be frustrated if it is held that only the factual correctness of the decree cannot be challenged, but its legal validity can be, even though an appeal against the preliminary decree has not been filed.

In the face of the above statutory provision, it is impossible to give effect to the

respondents" contention, that the inherent power of this court may be exercised and the anomaly of applying the Islamic law to partition avoided. I am also unable to accept the stand taken for the respondent, that the remand order did not decide the law applicable to the party, but left it to the trial court to take its own decision.

2. It must therefore follow, that the trial court committed an error in deciding the case according to the Marumakkathayam law. By the first preliminary decree, a reservation had been made in favor of the 1st defendant in respect of item 15, but in remanding the case, though no appeal had been made against the reservation, the preliminary decree was set aside in its entirety.

On the same parity of reasoning, the first defendant must be held to be concluded by the remand order so far as the reservation is concerned. Counsel for the first defendant had also a further contention with regard to some of the items of properties, apart from the reservation dealt with above. But I do not think it necessary to deal with it in the course that I am adopting by this judgment. As a result of the foregoing discussion, the preliminary decree under appeal is hereby set aside, and the case sent back to the first court for disposal in accordance with the Islamic law and in the light of the above observations; the first defendant is allowed refund of court fee paid on the appeal memorandum. Counsel for the respondent prayed that in view of the anomalous situation that has resulted and of my refusal to exercise the inherent power to remedy the same, leave to appeal may be granted; leave granted.