

(1988) 09 KL CK 0012
In the High Court Of Kerala
Case No : C.R.P. No. 1344 of 1988

Latitha Thankachi and Others

APPELLANT

Vs

Damodaran Thampi and Others

RESPONDENT

Date of Decision : 07-09-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 3

Citation : (1988) 2 KLJ 492

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

Bench : Single Bench

Advocate : T.P.K. Nambiar, for the Appellant; P. Sukumaran Nair, for the Respondent

Judgement

K. P. Radhakrishna Menon J.

1. Defendants 1, 2, 4, 5 to 8, 10 and 11 in a suit instituted by respondents 1 and 2 for a perpetual injunction restraining the defendants from trespassing upon the plaint schedule property, are the revision petitioners. The temporary injunction sought for was refused by the trial court. On appeal, the Appellate Court by the Judgment under challenge has appointed the additional Government Pleader as receiver to manage the properties, in dispute.

2. Facts which are relevant and essential to dispose of the dispute lie in a narrow compass. The first plaintiff, going by the pleadings "is dumb and idiot in his birth and he was not capable of looking after his affairs even after he attained majority and he was under the care and custody of his mother till her death and thereafter under the second plaintiff". The second plaintiff contends that he took over the guardianship of the first plaintiff on the strength of the will of the mother of the first plaintiff appointing him as the guardian of the first plaintiff. He is also the executor and administrator of the properties as per the will. The main relief sought for in the suit reads:-

For an injunction restraining the defendants from trespassing upon the plaint

lands and interfering with the plaintiff's peaceful possession and enjoyment over them.

3. According to the contesting defendants the plaint schedule properties are not in the possession of the plaintiffs. They in fact, are in possession of the properties and in proof of this contention they have produced Ext. B1 partition deed.

4. The suit as already noted, is a suit for injunction restraining the defendants from trespassing upon the properties belonging to the first plaintiff. The trial court was of the view that the plaintiffs were not successful in establishing their possession and as a result of which the petition for temporary injunction was dismissed. Whether that order was proper or not, has not been considered by the lower appellate court; on the other hand, the lower appellate court considered certain aspects which I do not say are irrelevant, but however, are not necessary for the disposal of the Interlocutory application. The question as to whether the plaintiffs are in possession of the property and as such entitled to the temporary injunction has not been dealt with by the lower appellate court in the manner in which a court should consider the question, which falls under Order 39 Rule 1 C. P. C

5. The judgment for this reason, is liable to be set aside. But whether the effect of the judgment should completely be wiped out or not is a matter that requires consideration in this revision.

6. That the plaintiff is a lunatic is admitted by both sides, But nevertheless no inquisition under The Indian Lunacy Act, 1912, for short "The Lunacy Act" has so far been instituted. So the question to be tackled is, can the court take action u/s 67 of The Lunacy Act without adjudging the 1st plaintiff as of unsound mind by instituting inquisition within the meaning of Section 62 of The Lunacy Act

7. It should in this connection be remembered that the order declaring a person to be of unsound mind and therefore incapable of managing his own affairs is an order of a very serious nature. It may even have the effect of disqualifying him from using his own properties as he likes. Such orders place a drastic check on his rights and personalities. That is why courts have been hesitant to declare a person as of unsound mind merely on the statements of interested parties. The legislature therefore has provided in the Act elaborate procedure for a declaration that a person is a lunatic, incapable of managing his own affairs and administering his properties.

8. Keeping these special features in mind let us try to get an answer to the question, A reference in this connection to the provisions contained in Chapter V of The Lunacy Act is profitable. Section 62 confers powers on the District Court to direct an inquisition, upon applications made by any of the persons referred to in Section 63, for the purposes of ascertaining whether the person mentioned in the application is of unsound mind and incapable of managing himself and his affairs. Section 64 regulates the proceedings of the Court whereas Section 65 enables

inquisition by Subordinate Courts on commission issued by District Court. The final order upon the completion of the inquisition whether the inquisition is conducted by the District Court directly or on commission by the Subordinate Court, has to be made by the District Court. Only on the passing of the final order adjudging the person as of unsound mind, the District Court u/s 67 can make an order for the custody of the lunatic and the management of his estate; provided of course, the conditions stipulated therein are satisfied.

9. A question however would arise: Has the court in the meantime and before instituting inquisition, any inherent jurisdiction to put the properties of a person who is alleged to be a lunatic, in custodia legis? In my judgment it is essential to find such inherent jurisdiction in courts, which are very much concerned with the welfare of lunatic as in the case of an infant, without which it may not be possible to protect and preserve the property belonging to the said person. The courts therefore, during the interregnum in the exercise of its inherent jurisdiction, could appoint an interim receiver although no action under The Lunacy Act was pending at the time when the order was made. The view expressed by the Calcutta High Court in *Rajendra Kumar Gupta Vs. Sailendra Kumar Gupta*, , with which with respect I agree, supports the above proposition. (See also *Kalachand Chunder v. Fatehdin A. I. R. 1949 Cal. 166*. The ruling in *Ex parte White* field 26 E. R. 592 is yet another authority for saying "that in the case of a lunatic a receiver for his property can be appointed wherever such appointment is deemed expedient although no action may be pending at that time and it makes no difference whether the lunatic has or has not been so found by inquisition".

10. It is in this background the question as to whether the lower Appellate Court was justified in issuing the order appointing the additional Government Pleader as receiver for the management of the estate of the Lunatic. One aspect that requires consideration in this connection is this: Are the defendants in possession of the properties in dispute? They submit that they are and in proof of this they have relied on Ext. B1 partition deed. Regarding the possession claimed by the plaintiffs, the trial court has found that they have not been able to prove the same.

11 But in the peculiar circumstances of the case, I am of the opinion that the plaint properties said to belong to the 1st plaintiff (even according to the contesting defendants more than one half of the property belongs to the 1st plaintiff, the plaintiffs submit) who according to the second plaintiff as also the contesting defendants is of unsound mind and as such incapable of managing his own affairs, requires to be protected and preserved. At the same time the right claimed by the defendants over the property in question also require to be protected. The lower Appellate Court has observed that neither the second plaintiff nor the 11th defendant (both of them claim that they are looking after the interest of the lunatic) has produced any material to find who in fact is managing the affairs of the lunatic. The second plaintiff filed the suit on the

strength of the will executed by the mother of the first plaintiff. The will has not been proved. The lower appellate court therefore has rightly observed "It is hence not possible for a court to come to a conclusion at this stage even prima facie that Ext. A4 will is genuine and valid". The nature of the suit instituted by the second plaintiff would suggest that he is not very much interested in the welfare of the first plaintiff. The 11th defendant on the other hand has been appointed by the will of the father of the first plaintiff as the guardian of the first plaintiff. He claims that the first plaintiff is under his care. According to him as also the other contesting defendants, a part of the properties belongs to the 1st plaintiff. Those properties also have been partitioned under Ext.B1, the document relied on by the defendants to establish that they are the owners in possession of the properties except the property allotted to the 1st plaintiff. The property thus allotted to the 2nd plaintiff according to the 11th defendant, is in his possession as guardian of the 1st plaintiff. The properties therefore require to be preserved till the question as to whether the 1st plaintiff is a lunatic is decided. The C. R. P. in the light of what is stated above, is disposed of in the manner indicated hereunder.

i. The properties which are the subject-matter of Ext. B1 partition deed will be under the management of the 11th defendant who is appointed as a receiver in the place of the Additional Government Pleader appointed by the District Court by the judgment under attack. If the 11th defendant is not willing to function as the Receiver, then the court below will appoint the Additional Government Pleader as the receiver. The receiver shall submit accounts to the court in terms of Order XL Rule 3 C.P.C.

ii. The District Government Pleader is directed to initiate proceedings u/s 63 of The Lunacy Act as expeditiously as possible, in any event within two months from the date of receipt of a copy of this order from the District Judge who is directed to provide the District Government Pleader with a copy of this order within two weeks from the date of receipt of a copy of this order.

iii. The District Court thereafter shall pass appropriate orders in the proceeding directed to be initiated by this order keeping in view the provisions contained in Chapter V of The Indian Lunacy Act. If such proceedings have already been initiated it is unnecessary for the District Government Pleader to initiate any fresh proceedings pursuant to the directions contained in this order. It is also made clear that the properties will continue in custodia legis till the disposal of the proceedings initiated under The Lunacy Act. The C. R. P. is disposed of as above. No costs.