
(2013) 08 KL CK 0030
In the High Court Of Kerala
Case No : F.A.O. No. 144 of 2011

Madhavi

APPELLANT

Vs

Radha

RESPONDENT

Date of Decision : 27-08-2013

Acts Referred:

Citation : (2013) 4 KLT 692

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : A. Mohammed Mustaque, for the Appellant; N. Nagaresh and K. Babu, for the Respondent

Judgement

Thomas P. Joseph, J.—Admit. Following are the substantial questions of law framed for a decision in this appeal arising from the order of remand:-

1) On the facts pleaded and evidence adduced there is unanimity as to the share of plaintiff and defendant over the plaint schedule property, both parties tracing title as a progeny. Differences between plaintiff and defendant as to which of the parent title vest whether, can be a ground to hold that plaintiffs failed to establish title to the property?

2) Whether on the facts and circumstances of the case the court below was justified in remanding the case for a re-trial?

2. Appellants are the plaintiffs. The suit property is 52 cents in RS No. 23/1 (old survey No. 104/3) which according to them belonged to Koodali Thazhathu tarwad in jenm. That property came into the possession of Ambu on kuzhikkanam right in the year, 1950. Plaintiff and the original defendant are legal heirs of the said Ambu. On that premise, plaintiffs demanded partition and separate possession of 1/4th share.

3. The deceased original defendant contended that the 80 cents in R.S. No. 23/2 belonged to her tarwad and the extent of property now available is only 74 cents.

She denied the claim made by the plaintiffs for partition and separate possession. The original defendant also raised a dispute regarding identity of property sought to be partitioned.

4. The trial court granted a preliminary decree for partition based on Ext. A1, the extract of "A" register. Respondents who are the legal heirs of the deceased defendant challenged that judgment and decree in the Additional District Court, Thalassery in A.S. No. 167 of 2006. Learned Additional District Judge observed that the trial court proceeded on a wrong assumption that the original defendant is wife of Ambu and hence either way, plaintiffs have right in the suit property. The lower appellate court was of the view that finding of the trial court is not correct.

5. Ext. A1 is the only document produced by the plaintiffs to prove the right claimed by him in the suit property. Dispute regarding identity of the property is not addressed by the trial court. Accordingly, judgment and decree in O.S. No. 48 of 2005 of the Munsiffs Court Kannur were set aside and the suit was remitted to that court for fresh decision. After remand, the trial court has recorded evidence and dismissed the suit. Against that, appellants have preferred appeal which is pending. In the meantime, after the period of limitation prescribed for filing appeal against the remand order in A.S. No. 167 of 2006, appellants have preferred this appeal under Order 43, R. 1(u) of the CPC (for short, "the Code") with an application to condone the delay. That application was allowed.

6. When the appeal came up for hearing on admission, this court dismissed the appeal as infructuous. That judgment was re-called as per Order dated 27.06.2013.

7. Learned counsel for the appellants contends that the reason which persuaded the lower appellate court to remand O.S. No. 45 of 2005 is erroneous. It is argued that Ext. B1 produced by the original defendant and relied on by the respondents would show that the suit property was acquired by Chemmarathy, W/o. Ambu (if not Ambu as stated in the plaint) and hence the appellant being legal heir of Chemmarathy along with the deceased defendant are entitled to get partition and separate possession of their share in the suit property. In that view of the matter, the remand order cannot be sustained. Learned counsel has brought to my notice the decision in Thottoli Kelu Gurukkal Vs. Thottoli Meenakshi Amma and others, to contend that even after disposal of the suit after remand, the remand order could be challenged in the appeal.

8. Learned counsel for the respondents contends that the appeal itself was preferred only after the trial court dismissed the suit after remand of the case as directed in the judgment in A.S. No. 167 of 2006 which is under challenge in this appeal. According to the learned counsel, even as per the observations in the decision in Kelu Gurukkal v. Meenakshi Amma (supra) the appellants could be permitted to challenge correctness of the finding entered by the lower appellate court in A.S. No. 167 of 2006 in the appeal arising from the dismissal of the suit

after remand.

9. It is not disputed that Ambu and Chemmarathy had four children - Madhavi (mother of original defendant), Kannan, Govindan and Kunhiraman. Appellants are legal heirs of the said Kannan. Govindan and Kunhiraman executed Ext. B1, release deed in favour of Madhavi, mother of original defendant releasing their right in the suit property to her. It is thus that appellants claimed that they have 1/4th share in the suit property and the remaining 3/4th went to the original defendant.

10. Ext. A1, copy of extract of "A" register is the only document produced by the appellants in the trial court. Ext. A1 revealed that the property is included in the name of K.T. Padmanabhan Nambiar who was prior owner of the property. Appellants claimed that Ambu got Kuzhikanam right from the said K.T. Padmanabhan Nambiar while the deceased defendant (Janaki) claimed that lease was obtained by her mother and that the appellants or their predecessor-in-interest have no right in the property. It is in that view of the matter that the lower appellate court observed that trial court has proceeded on a wrong assumption that Madhavi (mother of the deceased defendant) is the wife of Ambu and hence whether or not the lease was obtained by Ambu or Madhavi, the appellants have a right in the property. That view of the lower appellate court does not appear to be correct. For, Chemmarathy is the wife of Ambu and the mother of Madhavi (predecessor-in-interest of the respondents), Kannan (predecessor-in-interest of the appellants), Govindan and Kunhiraman. In Ext. B1, release deed in favour of Madhavi, the predecessor-in-interest of the respondents it is stated that property was in the possession of the mother of Madhavi (i.e. Chemmarathy). The lower appellate court failed to notice this aspect from Ext. B1 and then decide whether the appellants have right in the suit property even if it is assumed that property was in possession of Chemmarathy, mother of Madhavi. In that view of the matter, I am inclined to think that the order of remand is based on a wrong assumption of relationship between the parties.

11. So far as the dispute regarding identity of the property raised by the respondent is concerned, the lower appellate court has not taken any decision.

12. That, the trial court has, after remand of the case as directed in the judgment in A.S. No. 167 of 2006 dismissed the suit and that dismissal is under challenge in an appeal preferred by the appellants would not affect right of the appellants to challenge the remand order in A.S. No. 167 of 2006. In *Kelu Gurukkal v. Meenakshi Amma* it is observed in paragraph 5 that even after the suit is disposed of by the trial court after remand, parties could be allowed to raise all contentions in the appeal notwithstanding the remand order by the lower appellate court. That view does not appear to be correct in view of the decisions in *Nain Singh Vs. Koonwarjee and Others*, , *Sita Ram Goel Vs. Sukhnandi Dayal and Another*, and *Jasraj Inder Singh Vs. Hemraj Multanchand*, The decision in *Nainsingh v. Koonwarjee & Ors.* (supra) is followed by this court in *Mukkatithazhe*

Kottakkakath Kunhammed and Others Vs. Mukkatithazhe Kottakkakath Pathumotti and Others, In latter decision, a learned Judge of this court referring to S. 105(2) of the Code held that the correctness of remand order is subjected to further decision and consideration in view of the said provision (that situation arose in a case where the remand order was not challenged. In Krishna Pillai Rajasekharan Nair (D) by Lrs. Vs. Padmanabha Pillai (D) by Lrs. and Others, the Supreme Court has observed, as against correctness of an order of remand passed by the High Court as under:

When the matter reaches the forum superior to one which had made the order of remand earlier, it can go into the question of legality or validity of the order of remand. The Bar enacted by S. 105(2) applies up to the level of that forum which had remanded the matter earlier.

13. Thus, if the remand order passed by the learned Additional District Judge in A.S. No. 167 of 2006 were to stand if it were not challenged, the courts up to that level would have been bound by the remand order and the directions made therein. That also persuades me to interfere with the remand order notwithstanding that the trial court has disposed of the suit after remand and an appeal preferred by the appellants against that disposal is pending.

14. Consequence of my interfering with the remand order in A.S. No. 167 of 2006 and remitting the appeal to the lower appellate court for fresh disposal is that whatever transactions took place and the decisions entered consequent to the remand order in A.S. No. 167 of 2006 will stand washed out. The appeal preferred by the appellants against judgment and decree of the trial court after remand will also become redundant.

15. In the light of the above, the lower appellate court has to consider the claim for partition made by the appellants even if it is assumed that the suit property originally belonged to Chemmarathy (grand mother of the original defendant) and not belong to Ambu, husband of Chemmarathy. But I make it clear that I have not expressed any opinion as to in what way the lower appellate court has to decide that dispute. I also make it clear that I have not gone into the dispute regarding identity of the property raised by the deceased defendant which also is a matter the lower appellate court has to decide. The substantial questions of law framed are answered accordingly.

Resultantly, the appeal is allowed as under:-

- 1) Judgment dated 31.8.2010 in A.S. No. 167 of 2006 of the Additional District Court, Thalassery is set aside.
- 2) A.S. No. 167 of 2006 is remitted to the Additional District Court, Thalassery for fresh decision in the light of the observations made above and after hearing the parties.
- 3) Parties shall appear in the Additional District Court, Thalassery on 23.9.2013.

4) Parties shall suffer their cost in the appeal.