

(2016) 08 KL CK 0012
In the High Court Of Kerala
Case No : FAO.No. 126 of 2016

Mahin

APPELLANT

Vs

M. Sherif

RESPONDENT

Date of Decision : 06-08-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 22 Rule 2, Order 22 Rule 9, Order 43 Rule 1(k), 106

Citation : (2017) AIRCC 477 : (2017) 2 ICC 162 : (2016) 4 ILRKerala 564 : (2016) 3 KerLJ 813 : (2016) 4 KLT 13

Hon'ble Judges : Mr. A. Hariprasad, J.

Bench : Single Bench

Advocate : Sri. K.V. Sadananda Prabhu, Advocate, for the Appellants

Final Decision : Disposed Off

Judgement

Mr. A. Hariprasad, J.—Interesting legal question that arises for determination in this appeal is thus:

When a first appellate court rejected an application filed under Order 22, Rule 9 (2) read with Order 22, Rule 2 and Order I Rule 10 of the Code of Civil Procedure, 1908 (in short, "Code"), can the aggrieved party file an appeal by invoking Order 43, Rule 1 (k) read with Section 106 of the Code?

2. In order to answer the question, narration of brief facts are necessary. Deceased Raheema Beevi executed Ext.A1 settlement deed in the year 1997 in favour of her children, viz., the appellants and respondents. She had reserved a life estate and further declared that the document would come into effect only after her life time. While so, the 1st respondent attempted to alienate the property included in Ext.A1 after forcibly evicting his mother Raheema Beevi and her children. It is the case that then only she came to know about Ext.A2 deed, purported to be a release deed, where under Raheema Beevi said to have released her life estate in favour of the 1st respondent. This prompted Raheema Beevi to institute O.S.No.301 of 2006 before the Munsiff's Court, Alappuzha,

impleading all her children, claiming reliefs against Ext.A2 release deed, which was caused to be executed by committing fraud on her. Subsequently the 1st respondent filed O.S.No.753 of 2006 before the same court seeking prohibitory injunction against the appellants claiming absolute right under Ext.A1. While so, Raheema Beevi amended her suit by adding a plea that Ext.A1 itself was void and unenforceable in the light of the principles in Mohammedan Law. Joint trial of the suits were held. The trial court rejected the suit filed by Raheema Beevi and decreed the suit filed by the 1st respondent. Thereupon Raheema Beevi filed appeal, A.S.No.71 of 2009 before the District Court, Alappuzha. The appellants also filed A.S.No.72 of 2009 before the same court. While the appeals were pending, the sole appellant in A.S.No.71 of 2009 (Raheema Beevi) died on 15.03.2010. In the said appeal, the appellants were supporting their mother. However, they had not engaged a lawyer, so that the day today proceedings were not known to them. Therefore the legal representatives of deceased Raheema Beevi could not joint the lis and continue the proceedings. Resultantly A.S.No.71 of 2009 was dismissed as abated. In the said circumstances, the appellants moved I.A.No.826 of 2010 in the said appeal praying to set aside the order dated 17.06.2010, dismissing the appeal as abated and consequently sought their transposition as appellants in the place of their mother. The lower appellate court, accepting the plea of the 1st respondent that the cause of action did not survive in favour of the appellants, dismissed the interlocutory application by the impugned order. That order is challenged here under Order 43, Rule 1 (k) of the Code.

3. Heard the learned counsel for the appellants. In spite of service of notice, the respondents did not appear and contest.

4. At the time when the appeal was filed, the Registry raised an objection that a First Appeal against an Order (FAO) is not maintainable in view of the decision in *Damodaran v. Sankaran*, (1985 KLT 153).

5. Short facts narrated in *Damodaran's* case read as follows: A first appeal was preferred before this Court from a decree in a suit. The respondent in the appeal passed away pending the appeal. His legal representatives were not impleaded in time and thus the appeal abated. The appellant thereafter filed applications for impleading the legal representatives and for setting aside abatement. But these applications were dismissed by a learned Single Judge of this Court. Thereafter a Civil Miscellaneous Appeal (CMA) was filed against the dismissal of the applications. The question raised was whether an appeal would lie to a Bench of two Judges of this Court from an order of a Single Judge refusing to set aside the abatement of a first appeal? In the course of discussion, the Division Bench observed as follows:

"Rule 9 Order 22 provides for an application to set aside the abatement or dismissal of a suit and the combined effect of these provisions is that an appeal would lie from an order refusing to set aside the abatement of a suit. Since Rule 11 Order 22 further provides that the word "suit" in that order shall be held to

include an appeal, an application to set aside abatement of an appeal is also possible. But these are insufficient to hold that an appeal would lie from an order rejecting such an application. A right of appeal is a creature of statute; and so long as the fiction in Order 22, Rule 11 does not extend to Order 43, it is not easy to suggest that the Code creates a right of appeal from an order rejecting an application to set aside abatement of an appeal."

6. On a reading of the decision, it can be seen that the basis of the decision was the interpretation placed on the provisions in Section 5 of the Kerala High Court Act, 1958 (in short, "Act"). Division Bench considered various provisions in Section 5 of the Act and examined the precedents on the point. Finally, this Court came to the conclusion that the CMA was not maintainable either under Section 104 of the Code or under Section 5(ii) of the Act. Section 5(ii) of the Act provided an appellate remedy only against the judgment of a Single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of original jurisdiction by a subordinate court. Apparently, the order passed by the Single Judge, which was under challenge before the Division Bench, was an order passed on an application under Order 22, Rule 9 of the Code. Therefore, it was clear that it was not a judgment of a Single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of original jurisdiction by a subordinate court. For this sole reason, the appeal was incompetent. Therefore the observations quoted above were made in an appeal, which was legally not maintainable before a Division Bench. A pronouncement by a higher court becomes a binding precedent only when it declares the law in a validly instituted proceedings. Any expression of a legal principle in a proceeding, which is not allowed before a court, cannot claim the sanctity of a ratio decidendi.

7. The ratio in Damodaran's case rendered by interpreting Section 5(ii) of the Act, that order of a Single Judge refusing to set aside abatement of a First Appeal cannot be challenged before a Division Bench in appeal, was overruled by a decision of a Full Bench in K.S. Das v. State of Kerala, (1992 (2) KLT 358). But, the Full Bench did not consider the scope of the provisions in Order 22 or Order 43 of the Code. Likewise, the legal effect of Section 104 or Section 106 of the Code was also not considered in K.S. Das. The question referred to the Full Bench was as follows:

"Whether an appeal lies to a Division Bench under Section 5(i) of the Kerala High Court Act, 1958 against an interlocutory order in a Writ Petition, while the main Writ Petition is pending and if so, what are the circumstances under which or the types of cases in which such an appeal would lie?"

Interpreting the scope of Section 5(i) of the Act the Full Bench held that in a writ petition, under the circumstances indicated in the decision, an appeal will be maintainable against an interlocutory order. However, the question of maintaining an appeal against an order passed by an appellate court under Order 22, Rule 9 of the Code was not at all considered by the Full Bench and therefore the

observations in Damodaran's case quoted above remains untouched by the decision of the Full Bench in K.S. Das. Legally speaking, the decision of the Full Bench in K.S. Das, although overruled Damodaran's case on another reasoning, did not make any inroad into the above quoted statement of law in Damodaran's case.

8. If the above excerpt from Damodaran's case remains unaffected by the Full Bench decision in K.S. Das, what is the legal effect of that pronouncement? Is it the ratio decidendi therein or only an obiter dictum? It is apposite to clearly distinguish between ratio decidendi and obiter dictum. Black's Law Dictionary defines "ratio decidendi" as the principle or rule of law on which a court's decision is founded and as the rule of law on which a later court thinks that a previous court founded its decision; a general rule without which a case must have been decided otherwise. "Obiter dictum", according to the learned Author, is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).

9. The principles regarding ratio decidendi and obiter dictum in the context of English and Indian laws are almost similar. Great jurist Salmond "on Jurisprudence" (12th Edition) classifies the sources of law into four kinds, viz.,

- (a) Enacted law, having its source in legislation;
- (b) Case law, having its source in precedent;
- (c) Customary law, having its source in custom and
- (d) Conventional law, having its source in agreement.

(see pages 109 to 114)

Learned Author, at page 145, says that the judicial decisions may be distinguished as authoritative and persuasive. According to him, an authoritative precedent is one which Judges must follow whether they approve of it or not. A persuasive precedent is one which the Judges are under no obligation to follow, but which they will take into consideration and to which they will attach such weight as it seems to them to deserve. The view expounded by Salmond on "obiter dicta" reads as follows:

"In the course of his judgment, however, a judge may let fall various observations not precisely relevant to the issue before him. He may for instance illustrate his general reasoning by reference to hypothetical situations and the law which he considers to apply to them. Here of course, since the issue is not one that arises between the parties, full argument by counsel will be lacking, so that it would be unwise to accord the observation equal weight with that given to his actual decision. Or again, having decided the case on one point, the judge may feel it unnecessary to pronounce on the other points raised by the parties, but he may nevertheless want to indicate how he would have decided these

points if unnecessary. Here again we are not given the judge's final decision on a live issue, so that once more it would be unwise to endow it with as much authority as the actual decision. These observations by the way, obiter dicta, are without binding authority, but are nonetheless important: not only do they help to rationalise the law but they serve to suggest solutions to problems not yet decided by the courts."

10. I may refer to certain observations in *Precedent in English Law* by Cross and Harris (Clarendon Law Series, 4th Edition). According to the rules of precedent prevailing in England, every court is bound to follow any case decided by a court above it in the hierarchy and appellate courts (other than the House of Lords) are bound by their previous decisions. The classic quotation in *Quinn v. Leatham*, ((1901) AC 495) by Lord Halsbury is relevant, which reads as follows:

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but govern and are qualified by the particular facts of the case in which such expressions are to be found."

Regarding the "decisions without reasons", the said Authors have stated that in general, the authority of a decision for which no reasons are given is very weak, because it is so hard to tell which facts were regarded as material and which were thought to be immaterial.

11. Long line of decisions rendered by the Apex Court and this Court are also in tune with the aforementioned principles. A Full Bench of this Court in *United India Insurance Co. Ltd. v. Alavi*, (1998 (1) KLT 951) has clearly held that what is the essence of a decision is its ratio and not every observation, nor what logically follows from various observations made in it. This was approved by another Full Bench in *Joseph v. Special Tahsildar*, (2001 (1) KLT 958). The definite view expressed by the Supreme Court in *State of U.P. v. Synthetics & Chemicals Ltd.*, ((1991) 4 SCC 139), that any declaration or conclusion arrived at without application of mind or preceded without any reason cannot be deemed to be a declaration of law or an authority of a general nature binding as a precedent, was also noticed by the Full Bench in *Joseph's* case (*supra*).

12. Another Full Bench of this Court in *Raman Gopi v. Kunju Raman Uthaman*, (2011 (4) KLT 458) has also considered elaborately the value of precedents, after referring to all the precedents on the point.

13. Learned counsel relying on the decision of the Supreme Court in *Sreenivasa General Traders v. State of A.P.*, ((1983) 4 SCC 353) contended that the observations in *Damodaran's* case regarding the scope of an appeal against dismissal of an application under Order 22, Rule 9 of the Code actually did not arise for consideration and therefore it is merely an obiter dictum. In the said decision, the Supreme Court has observed that all the observations made by a Judge are not to be read as Euclid's theorems or as provisions in a statute. It is

further observed that where certain observations found in a judgment, which were not really necessary for the purposes of the judgment and which go beyond the occasion, have no binding authority though they may have merely persuasive value. Basing on a Constitution Bench decision of the Supreme Court in *Garikapatti Veeraya v. N. Subbiah Choudhury*, (1957 SCR 488), it is argued by the learned counsel that the legal pursuit of remedies, viz., suit, appeal and second appeal are really but steps in a series of proceedings connected by an intrinsic unity and are to be regarded as one legal proceeding. It is important to note that in Damodaran's case no reason has been mentioned as to why the appeal was found to be not maintainable under Order 43 of the Code.

14. In the light of the above discussion, it is clear that Damodaran's case (*supra*) could have been decided even without interpreting Order 22, Rule 9 or Section 104 of the Code. It is to be remembered that a right of appeal is not a common law right or an inherent right. It can be claimed only if the relevant statute provides for. In Damodaran's case, the finding, notwithstanding that it was deviated later by a Full Bench, was clear that Section 5 of the Act did not provide for a remedy by way of an appeal before a Division Bench from the orders passed by a Single Judge in appeal on interlocutory applications. Hence, at the most, the passage quoted above from Damodaran's case could have only a persuasive value as an obiter dictum.

15. Another point arising for consideration is whether the observations in Damodaran's case reflect the correct legal principles. It will be useful to consider the following provisions in the Code for clearly understanding the legal principles. Section 104 of the Code deals with "orders from which appeal lies". It says that an appeal shall lie from orders mentioned in the Section and save as otherwise expressly provided in the body of the Code or by any law for the time being in force and from no other orders. Relevant provisions can be seen in Order 43 of the Code. Rule 1 of that Order enlists the orders from which appeals are provided. Order 43, Rule 1 (k) of the Code says that an order under Rule 9 Order 22 refusing to set aside abatement or dismissal of a suit is an appealable order. Sub-section (2) of Section 104 of the Code says that no appeal shall lie from any order passed in an appeal under this Section. The principle of law in this Sub-section is very clear that the Code does not provide for a second appeal from any appellate order passed by invoking Section 104 and Order 43 of the Code.

16. Order 22, Rule 9 of the Code is the relevant subject. It reads as follows:

"Effect of abatement or dismissal.- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs

or otherwise as it thinks fit.

(3) The provisions of Section 5 of the Indian Limitation Act, 1877 (15 of 1877) shall apply to application under sub-rule (2).

Explanation.- Nothing in this rule shall be construed as barring, in any later suit, a defence based on the facts which constituted the cause of action in the suit which had abated or had been dismissed under this Order."

Yet another provision applicable in this case is Rule 11 Order 22 of the Code. It is excerpted hereunder:

"Application of order to appeals.- In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal".

The above mentioned provision is very clear and needs no elaboration. It is evident that by this provision, the Rules in Order 22 of the Code applicable to suits can be applied in appeals as well.

17. In this context, I may respectfully mention that the Division Bench in Damodaran's case did not consider the scope of Section 106 of the Code, which reads as follows:

"What Courts to hear appeals.- Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court."

First part of the Section is a general provision, which states that where an appeal from any order is allowed, it shall lie to the court to which an appeal would lie from the decree in the suit in which such order was made. The second part of the Section unambiguously states that where such an order is made by a court (not being a High Court) in the exercise of appellate jurisdiction, then an appeal would lie to the High Court. The case on hand is clearly falling within this category. As stated above, the first appeal was abated and the application to set aside abatement was dismissed by the lower appellate court stating disputable reasons, which are challenged herein. The second part of the above Section candidly show that an appeal is maintainable against an order passed by the first appellate court (not being a High Court) refusing to set aside abatement. The statement of law made otherwise in Damodaran's case is without noticing the legal provisions in Section 106 of the Code and therefore cannot be treated as a binding precedent. At the most, it might have been an obiter dictum. With utmost respect, I express my inability to be persuaded by the obiter dictum in Damodaran's case. For the reasons mentioned above, I am unable to agree with the observations therein. Therefore, I find the objection raised by the Registry is unsustainable since the observations in this regard in Damodaran v. Sankaran, (1985 KLT 153) were only obiter dicta and they were contrary to the provisions in the Code. I have no hesitation to hold that a party aggrieved by an order

passed under Order 22, Rule 9 of the Code by an appellate court (not being a High Court) has a right to file an appeal before the High Court by invoking Order 43, Rule 1 (k) of the Code.

18. Regarding the factual aspects in this case, the only mistake on the part of the appellants noticed by the lower appellate court was that the parties did not promptly take steps to set aside abatement and to transpose themselves as appellants. It is settled law that a meritorious matter shall not be thrown over the board on mere technicalities. The parties are seriously contesting the issues before the lower appellate court. The lower appellate court therefore should have allowed the plea to set aside abatement and to transpose the appellants. In the interest of justice, I find that the appeal has to be allowed. In the result, the appeal is allowed. The plea for setting aside abatement occurred on the death of the original appellant is allowed. The appellants are allowed to be transposed as the appellants in the first appeal and to continue the proceedings. The court below shall dispose of the appeal on merits, on an early date, immediately after getting a copy of this judgment.

19. All pending interlocutory applications will stand closed.