

(1984) 11 KL CK 0003
In the High Court Of Kerala
Case No : S.A. No. 443 of 1979-B

Mukkatithazhe Kottakkakath Kunhammed and Others	APPELLANT
Vs	
Mukkatithazhe Kottakkakath Pathumotti and Others	RESPONDENT

Date of Decision : 13-11-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 23, 105(2), 151

Citation : (1984) KLJ 864

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

Bench : Single Bench

Advocate : V.P. Mohankumar and K.P. Sreekumar, for the Appellant;

Final Decision : Dismissed

Judgement

K.P. Radhakrishna Menon, J.—Defendants 1 to 3, 5 to 11, 47 to 49 and 51 in O.S. 688 of 1965 in the Court of the Munsiff of Payyoli are the appellants. The suit was for partition and separate possession of plaintiffs' 7/52 shares in plaintiff A and B schedule properties. The questions formulated by this Court at the time of admission are: (1) Are the rights of the plaintiffs-respondents barred by adverse possession and limitation. (2) Is the principle laid down in *Jasraj Inder Singh Vs. Hemraj Multanchand*, applicable to the facts of the case.

2. If the answer to question No. 2 is on the affirmative, then only the first question need be considered

3. Facts relevant for considering the second question are given hereunder: The trial court by the judgment dated 28-11-1969 dismissed the suit. The plaintiffs thereupon filed an appeal, A.S. 33 of 1970 in the Court of the Subordinate Judge of Badagara and in the said appeal the points formulated for determination were:

1. Do the properties belong to the tavazhi of plaintiffs, defendants 1 to 11 and 13 to 46?

2. Are plaintiffs and defendants 31 to 33 the descendants of Kunhikayya Umma

and are they entitled to shares in the properties?

3. What are the correct shares?

4. Is the suit barred by adverse possession and limitation?

4. On point No. 1 the finding is that the A schedule property does not belong to the tavazhi of plaintiffs, defendants 1 to 11 and 13 to 46. On point No. 2 the appellate court has found that the 7th plaintiff and defendants 45 and 46 are not entitled to any share in the properties. Regarding point No. 3 the finding is this:

Since I propose to remand the suit to the lower court, the lower court will determine the shares to which the sharers are entitled.

The finding on point No. 4 is that the suit is not barred by limitation.

5. Since the appellants have not challenged the remand order by filing an appeal, they are bound by the said order. That being so, the appellants are precluded from disputing the correctness of the order and also the findings on which the order is based, in any proceeding that may emerge after the remand. To put it briefly, the correctness of a remand order cannot be subjected to further investigation and consideration in view of Section 105(2), Civil Procedure Code. I am fortified in this view by a pronouncement of the Supreme Court in *Nain Singh Vs. Koonwarjee and Others*, . The Supreme Court has stated thus:

The order in question was made under Rule 23, Order 41, Civil Procedure Code. That order was appealable under Order 43 of that Code. As the same was not (appealed against, its correctness was no more-open to examination in view of Section 105(2) of the Code which lays down that where any party aggrieved by an, order of remand from which an appeal lies does not appeal therefrom he shall thereafter be precluded from disputing its correctness.

If this be not the position, the policy of the legislature to treat an order of remand as a special case and give it a finality in case the order is not appealed against, will be defeated.

6. Similarly courts cannot correct such orders of remand which have become final, in the exercise of inherent jurisdiction u/s 151, CPC, since there is a remedy provided against such orders in the CPC but failed to avail of by the aggrieved party. This position is well elucidated by the Supreme Court in *Nainsingh's* case itself. The Supreme Court has held that "Under the inherent power of Courts recognised by S. 151, CPC, a Court has no power to do that which is prohibited by the Code. Inherent jurisdiction of the Court must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case, such provisions should be followed and inherent jurisdiction should not be invoked. In other words the Court cannot make use of the special provisions of Section 151 of the Code where a party had his remedy provided elsewhere in the Code and he neglected to avail himself of the same. Further the power u/s 151 of the Code cannot be exercised as an

appellate power."

7. I could have closed the discussion here and disposed of the appeal. But the learned counsel for the appellants relying on the decision of the Supreme Court in *Jasraj Inder Singh Vs. Hemraj Multanchand*, = *Jasraj Inder Singh Vs. Hemraj Multanchand*, , contended that this Court is not bound by the remand order and therefore the appellants are entitled to agitate even matters which are concluded by the remand order because the whole lis has come up before this Court for the first time, only now. In other words, he submitted that this Court is not bound by the remand order notwithstanding the provisions contained in Section 105(2) of the CPC and if that be so the appellants are well within their right to agitate the various questions which apparently have been concluded by the remand order. The non-filing of an appeal against the remand order is not fatal in view of the above pronouncement of the Supreme Court, he submits. Noticing these contentions, it is submitted, this Court has formulated the second question. In *Jasraj's* case, the Supreme Court after considering the fact of the case has held thus:

The appeal before the Supreme Court is from the suit as a whole and, therefore, the entire subject matter is available for adjudication before us. If, on any other principle of finality statutorily conferred or on account of *res judicata* attracted by a decision in an allied litigation the matter is concluded, we too are bound in the Supreme Court. Otherwise, the whole lis for the first time comes to this Court and the High Court's finding at an intermediate stage does not prevent examination of the position of law by this Court.

(emphasis supplied)

8. The ratio of the decision in *Jasraj's* case is that matters other than those which are concluded on the "principle of finality statutorily conferred or on account of *res judicata* attracted by a decision in an allied litigation", alone are available for adjudication before the appellate court although the appeal is from the suit as a whole. If this be not the position, Section 105(2) would become otiose.

9. I am therefore of the view, that this pronouncement of the Supreme Court in no way has struck a different note from the pronouncement in *Nainsingh's* case. The learned counsel for the appellants also cited another pronouncement of the Supreme Court in AIR 1981 707 (SC) , in support of his contention that this Court is not bound by the remand order. An altogether different principle has been considered by the Supreme Court in the said decision. The Supreme Court was considering the question whether an order of remand passed by the High Court not having jurisdiction and hence illegal, can be challenged by the aggrieved party while agitating the cause in the Supreme Court in an appeal from the final order of the High Court after remand. The Supreme Court held:

Where the High Court in second appeal though not having jurisdiction illegally reversed the concurrent finding of fact and ordered remand, the aggrieved party

can, in an appeal to the Supreme Court from the final order of the High Court after remand, challenge even the first order of the High Court making remand and all the proceedings taken thereafter as a result of the illegal order of remand. The first judgment of the High Court ordering remand being illegal all the proceedings taken thereafter would become void ab initio Judgments of the Patna High Court dated 17-2-1967 and 30-9-1970, Reversed. (head-note)

This decision has no application to the facts of the case on hand. The answer to the second question therefore is in the negative i.e., the pronouncement of the Supreme Court in Jasraj's case has no application to the facts of the case. In view of this answer, I hold that the first question does not arise for consideration.

The second appeal fails and the same is dismissed with costs.