

(1966) 01 KL CK 0003

In the High Court Of Kerala

Case No : Second Appeal No. 938 of 1961

Narayana Pillai Gopala Pillai and Another

APPELLANT

Vs

Krishna Pillai Chellappan Pillai

RESPONDENT

Date of Decision : 05-01-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 41 Rule 20, Order 41 Rule 35, Order 41 Rule 4

Citation : AIR 1966 Ker 317

Hon'ble Judges : M.S. Menon, C.J;P. Govindan Nair, J

Bench : Division Bench

Advocate : C.K. Sivasankara Panicker, for the Appellant; P.C. Chacko and P. Krishnamoorthy, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal was taken by the two plaintiff's in the suit, plaintiff's 1 and 2. The second plaintiff, the second appellant, the mother of the first appellant, died after this second appeal was filed. It is said that the first plaintiff is entitled to continue the appeal and we have assumed that the first plaintiff is entitled to do so without deciding the question.

2. The suit was for paddy and money alleged to be due from the defendants in accordance with the provisions of a will executed by the deceased husband of the second plaintiff.

The suit was decreed by the trial Court. The second defendant, one of the legal representatives of one of the legatees under the will who was obliged to pay the paddy and money claimed in the plaint preferred an appeal before the lower appellate Court. Defendants 1 and 3 to 8, the other legal representatives of the legatee were not parties to that appeal. However the appeal was allowed and the suit was dismissed in its entirety. In this second appeal only the second defendant, the appellant before the lower appellate Court has been made a party.

3. A preliminary objection has been taken by the respondent that the appeal is not sustainable because the necessary parties are not before the Court. It is urged that the appeal cannot even be considered on the merits as against the second defendant, the only respondent to this appeal, because in such a case the decision of this Court may give rise to conflicting decrees.

4. In order to understand this contention it is necessary to read Rule 4 of Order XLI of the C. P. C.

"4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all--Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be."

There can be no doubt that the decree that has been passed by the lower appellate Court is a decree in favour of all the defendants, defendants 1 to 8, for the suit has been dismissed in its entirety and it is not contended otherwise. There is therefore, now a decree in favour of defendants 1 and 3 to 8 as well. In those circumstances it is urged that this Court should not decide the matter without those defendants, defendants 1 and 3 to 8 on the party array.

5. Counsel for the appellant invited our attention to Rule 35 of Order 41, and urged that he is bound to bring on record on the party array only such persons who were *eo nomine* made mention of in the decree appealed against, and that he had done so, and that therefore, the appeal cannot be said to be ill-constituted. It was further urged that by virtue of Rule 4 of Order 41, the second defendant, the appellant before the lower appellate Court has been invested with a representative capacity which will continue even after the disposal of the appeal by the lower appellate Court enabling him and obliging him to represent the other parties, in this case defendants 1 and 3 to 8, in the second appeal as well.

6. The effect of the decree passed by applying the provision in Rule 4 of Order 41 is to confer a favour in favour of those who were not parties at the appellate stage provided the appeal proceeded on a ground common to them as well as the appellant before that Court. The decree so passed is in their favour. So we are of the view that they must be parties in any appeal taken from that decree. This is the view that our learned brother Justice Krishnamoorthy Iyer sitting single, has taken in the judgment in S. A. No. 1517 of 1961 (Ker). We are in respectful agreement with the view expressed therein.

7. We are unable to accept the contention that by the provision in Rule 4 of Order 41, the second defendant has been invested with a representative capacity which will oblige him to represent the other defendants in further appeal. Nor can Rule 35 of Order 41 be an answer to the objection that the appeal is ill-

constituted. In order to find out who all should be parties in an appeal from a decree which has been passed applying Rule 4 of Order 41, we must look not only to the appellate decree and those mentioned in that decree as parties but also see the effect of Rule 4 of Order 41. If we do so, there can be no doubt that defendants 1 and 3 to 8 in whose favour a decree has been passed by the appellate Court, are necessary parties. They must therefore, be on the party array.

8. It is not urged before us that if defendants 1 and 3 to 8 are necessary parties to this appeal it can be sustained as against the 2nd defendant, the sole respondent in view of the decision of the Supreme Court in *The State of Punjab Vs. Nathu Ram*, .

9. In the result we have told that this appeal is not maintainable as the necessary parties are not on the party array. We dismiss the appeal but without any order as to costs.