

(1995) 06 KL CK 0040
In the High Court Of Kerala
Case No : A.S. No. 129 of 1985

Noor Mohammed Shahul Hameed

APPELLANT

Vs

Shahul Hameed Amin

RESPONDENT

Date of Decision : 21-06-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 22 Rule 11, Order 22 Rule 3, Order 23 Rule 1

Citation : (1995) 06 KL CK 0040

Hon'ble Judges : B.M. Thulasidas, J

Bench : Single Bench

Advocate : S.N. Poti, B.V. Deepak and S. Ramesh Babu, for the Appellant; T.K. Radhakrishnan, D. Anil Kumar, N.A. Augustine, A.K. Sreenivasan, K. Jayakumar and Babu Karukappadath, for the Respondent

Final Decision : Dismissed

Judgement

B.M. Thulasidas, J.—The appeal is by the plaintiff in O.S. No. 234 of 1980 of the Second Additional Sub Judge, Thiruvananthapuram in which he sought to set aside Ext. B 3 settlement deed he had executed and for recovery of possession of the suit properties. Defendants 1 to 4 are his children, 5th defendant is the daughter of the first defendant and defendants 6 to 9 are the children of the third defendant. Defendants 10 to 12 are certain transferees of properties from the other defendants. The plaintiff was a teacher and a P.W.D. Contractor. The suit properties are his self-acquisitions. The first defendant is a practising Advocate, in whom he had full confidence, and was managing his affairs and properties. Allegedly the plaintiff fell ill in March, 1978 and he expressed his desire to settle his properties upon the children make provisions for discharge of his liabilities and wanted the first defendant to arrange for the same. His physical condition deteriorated in July, 1978 and he was unable even to attend to his normal chores. He was fully dependent upon the first defendant, who had been looking after him. Eventually the first defendant made him believe that he had arranged for his treatment in Ayurvedic College Hospital, Thiruvananthapuram.

Just before he was admitted there he was taken to his office at Vanchiyoor, where he spent the night and on the next day afternoon, a draft of the settlement deed was shown and he was made to believe that it was prepared as per his wishes. He signed the document at the places indicated and it was registered on 31-7-1978. Later he was taken to an expert doctor for better treatment and his condition improved. All the documents relating to the documents were with the first defendant. But later he came to realise that the document had not been prepared as per his wishes. The properties were in his possession and he had been taking the income. On 20-6-1980 he came to know from the 12th defendant that defendants 2 and 3 had alienated portions of the properties settled in their favour. On 23-6-1980 he got a copy of the settlement deed and upon persuing the same he realised that the first defendant had misrepresented matters to him and played fraud in collusion with defendants 1 and 3. The deed did not represent his intentions and desires. He maintained that he signed the document without being fully aware of the nature of the dispositions. The execution of the document was also not voluntary or in exercise of his free will. A major portion, of the properties had been allotted to the first defendant. Defendants 5 to 9 were also given shares. He contended that the document is either void or voidable and not binding on him. Accordingly he filed the suit to set aside the document and for recovery of possession of the properties from the defendants. Defendants 2, 3 and 6 to 20 together and defendants 1 and 5 filed written statements. The present petitioner who was the fourth defendant remained ex-parte. The allegations in the plaint were denied by the contesting defendants, who maintained that the plaintiff was not entitled to the reliefs claimed and prayed for dismissal of the suit.

2. On the contentions, the court below raised appropriate issues. The plaintiff and 7 witnesses were examined as P.Ws 1 to 8. Defendants 1, 12 and 20 gave evidence as P.Ws 1, 4 and 6 and 3 witnesses Were examined as DWs 2, 3 and 5. Exts. A1 to A17, Exts. B1 to B49, Exts. C1 to C3 and Ext. X-1 were marked. The court below held that the plaintiff executed Ext. B 3 voluntarily after knowing its contents and that it is not liable to be set aside. It was also held that he was not in possession of the suit properties as alleged. The suit was dismissed with costs of defendants 1 to 3 and 5 to 20.

3. The present appeal was filed by the plaintiff on 17-4-1985. He died on 29-1-1987 and the above C.M.P. was filed by the 4th defendant - 4th respondent in the appeal, under Order XXII Rule 3 and 11 of the CPC to transpose him as additional appellant to enable him to prosecute the appeal. In the affidavit in support of the petition he has stated that lie is a legal heir of the deceased - appellant, entitled to prosecute the appeal, and therefore should be transposed as additional appellant in the interests of justice.

4. Objections were filed by respondents 10, 13, 15 and 19, where identical contentions have been advanced. They have contended that on the averments in the plaint the deed of settlement was not voidable or void that the petitioner who

is a donee in respect of plaint schedule item No. 10, had accepted and acted upon the deed and sold the said item to some of the respondents bona fide and for valuable consideration. He is therefore precluded from challenging the deed executed by the deceased appellant and is incompetent to prosecute the appeal. The application has therefore to be dismissed.

5. The petitioner filed C.M.P. Nos. 1635, 1636 and 1637 of 1991, the first of which is to implead the legal representatives of deceased first respondent and the other two are for setting aside the abatement after condoning the delay of six days in filing the application. He appears to have assumed that he had been transposed as an additional appellant and permitted to prosecute the appeal. Those applications are also opposed by some of the contesting respondents, who have filed counter affidavits.

6. Heard.

7. Petitioner is one of the legal representatives of the deceased appellant who was the plaintiff in O.S. 234/80 and he has sought to come on record as additional appellant to prosecute the appeal. Under rule 3 of Order XXII, where the sole plaintiff died and the right to sue survives the court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Under rule 11 the provisions of Order XXII also apply 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." Unless the right to sue survived, it may not be possible for the petitioner as one of the legal representatives of the deceased plaintiff to be impleaded as appellant and prosecute the appeal. The question is whether the right to sue survived to the petitioner, in other words, whether he has a right as legal representative of the deceased appellant to be transposed as an additional appellant and prosecute the appeal.

8. The relevant facts of the case have been dealt with in the impugned judgment. As already stated, the suit was for setting aside Ext. B 3 and for recovery of possession of the suit properties, Even though the plaintiff alleged that Ext. B 3 was vitiated by fraud and misrepresentation as also undue influence, his contentions were repelled and the suit was dismissed. It was found that Ext. B 3 is valid, binding and had taken effect. Petitioner was the 4th defendant and he remained ex-parte. As per the settlement deed, he had obtained properties, which he sold. That indicated that he too has accepted and acted upon it. Virtually he must be held to have endorsed the contentions of the contesting defendants. Surely, if his case was otherwise, one would not expect the sort of conduct he had displayed at the trial.

9. The right to sue was only with the deceased plaintiff, who had attacked Ext. B 3 as either void or voidable. It was indeed a voidable document and could have been set aside only if he had established the alleged vitiating circumstances. He

had failed to do so and the suit was accordingly dismissed. The right to sue did riot evidently survive on his death to enable the petitioner as one of the legal representatives to prosecute the appeal.

10. The principles relating to transposing of the parties had been enunciated in the decision reported in Rameswara Das v. Purnachandra Rao AIR 1958 A.P. 494, where it was held :

The possibility of transposition, which often amounts to a virtual substitution of a new plaintiff for the plaintiff on record, turns on the question whether the very institution of the suit by the plaintiff is under a bona fide mistake as to his rights, capacity or status. The principle underlying R. 10 is to save honest plaintiffs, believing bona fide in the tenability of their claims, being non-suited on a mere technical ground. There are, however, two limitations on the free and unfettered application of this power. One is, that the institution of the suit should have been under a genuine mistake. Secondly, it engrafts on the general power of courts an exception that a valuable right acquired by the other defendants should not be defeated. The expression "valuable right" Of course, means a right other than a claim for rejection of the suit itself on the ground of institution by a wrong plaintiff.

It was no doubt held in AIR 1924 45 (Lahore) :

When a party to a suit dies, a legal representative is appointed merely in order that the suit might proceed, and a decision be arrived at. It is the original parties rights and disabilities that have to be considered and not those of the legal representatives.

The facts as disclosed in the judgment are different and the decision does not seem to have application to the facts of this case.

11. It was held in Manphool and Others Vs. Surja Ram and Others, :

Before allowing a party to be transposed as a plaintiff the Court can insist that it should be prima facie satisfied about (i) the bona fides of the applicant, (ii) the plausibility of the applicant's claim and (iii) the genuineness of his interest in the litigation.

There was hardly any bona fides in the petition. The genuineness of his interest in the litigation was also suspect in view of his conduct in relation to Ext. B 3 that has been impugned in the suit.

12. The decision reported in Devassi Vs. Anthoni, is apposite. The suit filed by the plaintiff was withdrawn under sub-rule (1) of rule 1 of order XXIII. It was for accounting of a dissolved partnership. Defendant denied the partnership and also maintained that there was no accounting relationship between him and the plaintiff. He had applied for transposition as a plaintiff, which was dismissed. It was held that there was no question of treating/occupying the role of a plaintiff, and permit his transposition so as to preclude the plaintiff from withdrawing the

suit, which was sought, he had not sought amendment of the written statement. The court observed that no application was filed to amend the written statement, and, - so long as the defendant's plea was that there was no partnership and so long as there was no finding that there was a partnership, how could the defendant be transposed to prosecute a suit which, on his own plea, had to be dismissed?

In *Thakur Chaudhry and Others Vs. Brahmdeo Chaudhry and Others*, , it was held:

O.1 R. 10 (2) permits transposition of parties from one category to another but such transposition is generally not allowed if nature of the suit is likely to be altered. Parties can no doubt be added as plaintiffs or defendants in order to avoid multiplicity of suits. But the addition must be necessary for final adjudication of the question in dispute. It does not permit joinder of causes of action. A person can be added as a co-plaintiff only when he can adopt the plaintiff's case. Persons having conflicting claims cannot be made co-plaintiffs. If the plaintiff and the defendant have conflicting cases the question of making the defendant a plaintiff and the plaintiff a defendant does not arise until the plaintiff is withdrawing from the suit. Therefore, when in a partition suit the claim of some of the defendants is contradictory to the case of the plaintiffs those defendants cannot be made plaintiffs and the plaintiffs the defendants until the plaintiffs are withdrawing from the suit.

In *Santuram Hari Vs. Trust of India Assurance Co.*, , Chagla C.J., as he then was, held :

Although the original plaintiff might not be entitled to maintain the suit, it is competent to the Court exercising its discretion under O.1 R. 10 to transpose a party defendant to the place of the plaintiff, such a party being entitled to maintain the suit, and pass the decree in favour of the newly added plaintiff though in most cases the Court would not exercise its discretion in transposing defendants as party plaintiffs where a valuable right acquired by one of the defendants is likely to be taken away or defeated.

The facts of the case reported in *Madhavan Pillai v. Vasu Pillai* 1989 (1) KLT 168, were different. One of the parties in the suit wanted to get himself transposed as the plaintiff, which was disallowed by the trial court and was allowed by this court. There a usufructuary mortgage was created by the father of the plaintiff, on whose death his rights devolved upon his children. The suit was filed by one of the children of the original mortgagor, in which the other co-mortgagors were also made parties. One of the defendants (D-11), petitioner before this court, was set ex-parte. The suit was once dismissed, the plaintiff applied for restoration, which was dismissed, but was allowed by the appellate court. The 11th defendant applied to transpose him as the plaintiff since he alleged that the original plaintiff was unwilling to prosecute the suit and wanted the suit itself to be dismissed for non-prosecution. He also apprehended that he may withdraw

the suit without the consent of the co-mortgagors. On the above background the application for transposition was filed, which was contested by the mortgagees, but not the original plaintiff. It was observed that the fact that he remained ex-parte cannot debar him from making a claim for transposition, if he is otherwise entitled to it. After discussing the relevant case law, reliance was placed upon AIR 1931 162 (Privy Council) , AIR 1939 170 (Privy Council) , to hold that the court has power, over and above the provisions in Order 1 Rule 10 to permit transposition of parties in appropriate cases, where it was felt necessary to do so for a complete adjudication of the question involved in the suit and to avoid multiplicity of proceedings. Even in a case where the plaintiff desired to withdraw the original suit but where the defendant desired to proceed, the appropriate course in the circumstances would be to transpose the plaintiff and make the defendant a plaintiff. The decision however does not apply to this case, the facts being different.

Obviously the petitioner had sought to blow hot and cold. Having accepted Ext. B 3 and derived the benefits thereunder and virtually participating in non-suiting the plaintiff, it is certainly not open to him now to turn round and take up his case, after his death. Such a volte-face is legally impermissible. In my view he is not entitled to get himself transposed as an additional appellant in the appeal. The application is hence dismissed. In consequence, the other C.M.Ps he had filed for impleading, setting aside abatement and condoning delay shall also stand dismissed.