
(1992) 10 KL CK 0041
In the High Court Of Kerala
Case No : S.A. No. 625 of 1992-G

Padinjarayil Paru and Others

APPELLANT

Vs

Chengala Madathil Devaki Varassiar and Others

RESPONDENT

Date of Decision : 12-10-1992

Acts Referred:

Citation : (1992) 10 KL CK 0041

Hon'ble Judges : P.K. Balasubramanyan, J

Bench : Single Bench

Advocate : P.V. Narayanan Nambiar and M.P. Ashok Kumar, for the Appellant;

Judgement

P.K. Balasubramanyan, J.—This Second Appeal is filed by the legal representatives of the second Defendant in O.S. No. 113 of 1985 on the file of the Munsiff's Court of Payyannur. That suit was filed by Respondents 1 to 4 for recovery of possession of the plaint schedule property on the strength of title. The second Defendant in the suit resisted the suit for recovery by setting up a tenancy in the first Defendant. By judgment dated 28th February 1989 the trial Court decreed the suit. The second Defendant filed A.S. 99 of 1989 before the Subordinate Judge's Court challenging the said decree on 1st August 1989.

2. While the appeal was pending the sole Appellant in the appeal, the second Defendant died. He died on 8th January 1992. Neither the counsel for the Appellant nor the legal representatives of the Appellant brought that fact to the notice of the Lower Appellate Court. The Lower Appellate Court heard the appeal on 17th January 1992. The Lower Appellate Court delivered the judgment in the appeal on 31st January 1992. Since at the time the appeal was heard and decided the Appellant before the Lower Appellate Court had died, the Lower Appellate Court could not proceed with the appeal on the merits. Without attempting to get the appeal reopened and to get themselves impleaded as the legal representatives of the deceased Appellant, the legal representatives have attempted to come forward with this Second Appeal challenging the decree of the Lower Appellate Court in the appeal filed by their predecessor-in-interest inter

alia on the ground that the decree of the Lower Appellate Court is a nullity. When the matter came up for admission I put it to counsel for the Appellants as to whether their remedy was not to approach the Lower Appellate Court for a reopening of the decree in A.S. 99 of 1989 or is it open to them under law to file a Second Appeal in this Court without recourse to that remedy. The learned Counsel took time and has elaborately argued that aspect before me.

3. In the decision reported in *Meenakshy Pillayathiri Amma v. Lakshmi* 1967 KLT 777 this Court noticed that the proper procedure to be adopted is to apply to the Court which passed the decree and to seek the impleading of the legal representatives of the deceased party and to get a rehearing of the suit or appeal. This decision was noticed by a Division Bench in the decision reported in *Abdulla v. Damodaran Namboodiri* 1972 KLT 53 where it was held that the action of a trial Court, to which the matter had been remanded, in placing the matter before the appellate Court which remanded the matter and bringing to its notice the fact, that at the time the appellate judgment was rendered one of the parties to the appeal had died was approved by this Court thereby indicating that the proper procedure to be adopted was to go to the Court which had passed the decree without knowledge of the death of a party before it. In the decision reported in *Assyamma v. Aisabi* 1976 KLT 101 it was clearly stated that a decree passed by the first appellate Court in ignorance of the fact of death is a nullity in the eye of law. It was further stated "strictly speaking, there was no decree to be appealed against". In the light of these decisions it appears to me to be clear that the remedy of the legal representatives of the deceased Appellant before the Lower Appellate Court lay in approaching that Court to get the appeal reopened, to get themselves impleaded and to proceed with the appeal in accordance with law.

4. The learned Counsel for Appellants Sri Narayanan Nambiar contends that that might be one of the remedies, available to the legal representatives but that he is not precluded from filing a Second Appeal and challenging the decree on the ground that it is a nullity. For this he relies upon paragraph 3 of the decision reported in *Assyamma's* case 1976 KLT 101 wherein this Court set aside the ineffective decree (as it was called therein) and granted an opportunity to the Appellants in the Lower Appellate Court to take appropriate steps. He contends that this course should be adopted in every case where a decree is passed by a Lower Appellate Court without noticing the death of one of the parties to the appeal. I am afraid that the passages relied on by him in the decision reported in *Assyamma's* case 1976 KLT 101 does not lay down any principle of law that in such circumstances the second appellate Court is bound to set aside the decree of the Lower Appellate Court. It is also not very clear from the said decision as to when exactly the factum of death was discovered. I also find that all that His Lordship had said was that it was for the Appellant before the Lower Appellate Court to take appropriate steps before the Lower Appellate Court. Here in this case the fact that the Appellant died prior to the passing of the decree by the Lower Appellate Court has become obvious. The legal representatives are

attempting to file this Second Appeal. All that this Court can do is indicate to the legal representatives that their proper remedy lies in moving the Lower Appellate Court with the necessary applications for getting themselves impleaded and for getting a proper re-adjudication of the appeal. No principle of law enables or entitles the legal representatives to straightaway file a Second Appeal before this Court on an assertion that the decree of the Lower Appellate Court passed against their predecessor-in-interest who was the sole Appellant therein was a nullity. Even if the decision in the appeal was a nullity it could not set at naught the decree of the trial Court which was one against the predecessor-in-interest of the Appellants in this Second Appeal.

5. The learned Counsel also brings to my notice the decisions reported in *Jiviben Lavji Raganath Vs. Jadavji Devshanker and Others*, and *Baij Nath and Another Vs. Munna Lal*, . All that was held in *Jiviben Lavji Raganath Vs. Jadavji Devshanker and Others*, was that when the sole Appellant died the decree was a nullity. That proposition cannot be in doubt. The question here is what is the remedy of the legal representatives in such a situation. Neither the decision reported in *Jiviben Lavji Raganath Vs. Jadavji Devshanker and Others*, or *Baij Nath and Another Vs. Munna Lal*, is authority for the proposition that they can straightaway file a Second Appeal.

6. It must also be remembered that it was due to the error committed by the legal representatives of the deceased Appellant that the death of the Appellant was not brought to the notice of either counsel who was appearing for him in the Lower Appellate Court or to the Court. Once the legal representatives have come to know that the appeal has been decided on the merits at a time when their predecessor-in-interest had died, according to me, the only remedy available to them is to move that Court to get the decree reopened and to get themselves impleaded in that appeal. In that view of the matter I hold that the Second Appeal filed by the legal representatives of the deceased Appellant in A.S. 99 of 1989 on the file of the Subordinate Judge's Court of Payyannur is not maintainable.

The Second Appeal is rejected.