
(1992) 12 KL CK 0007
In the High Court Of Kerala
Case No : S. A. No. 592 of 1988

Rugmini Amma Saraswathy Amma

APPELLANT

Vs

Raman Pillat Madhavan Nair

RESPONDENT

Date of Decision : 03-12-1992

Acts Referred:

Citation : (1993) 1 KLJ 588

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

Bench : Single Bench

Advocate : P. Sukumaran Nair and B. Radhakrishnan, for the Appellant; B. Krishnamani, for the Respondent

Judgement

P. K Balasubramanyan, J.—Defendants 1, 2 and 4 in suit for declaration of title, possession, in junction restraining entry and for fixing the Northern boundary of the property belonging to the plaintiff are the appellants. The plaint A schedule property has an extent of 1 acre 23 cents and the plaint B schedule property is the building situate in plaint A schedule property. The plaint A schedule property belonged to Kovit Vilakath Voedu. Their was a partition Ext B1 in the year 1103 in that family. The plaintiff claimed title by virtue of subsequent assignments of the plaint A schedule property. The plaint A schedule property, according to the plaint, took in 33 cents in Sy. No. 165/3A and 90 cents in Sy. No. 165/3B. The soil was originally filed only against the first defendant. The first defendant contended that the plaintiff had title only to 32 cents in Sy" No, 165/3A and had no right or possession over any portion of the property included in Sy. 165/3B. The first defendant also contended that other persons were interested in that survey number and without their being impleaded, the suit cannot be properly decided. Subsequent thereto defendants 2 and 4 were also impleaded by the plaintiff Defendants 2 and 4 also questioned the title claimed by the plaintiff over. Survey No. 165/3B. It can thus be seen that the contentions raised by defendants 2 and 4 were similar to those that were raised by the first defendant. The trial court dismissed the suit finding that the plaintiff has not established title

or possession over Survey No. 165/3B. But on appeal by the plaintiff the lower appellate court held that the plaintiff has title and possession over a part of Sy. No. 165/3B. The suit was therefore partly decreed by the Lower appellate court with reference to the commissioner's plan Ext C2 which was directed to be appended to the decree. The defendants 1, 2 and 4 filed this Second Appeal on 27-5-1988 challenging the decree passed by the lower appellate court. While the appeal was pending appellant No. 1 who was defendant No. 1 in the suit died on 13-12-1989. The legal representatives of the deceased first appellant 1st defendant did not take steps to get themselves impleaded in the appeal in time. Appellants 2 and 3- defendants 2 and 4- also did not take any steps to implead the legal representatives of deceased first appellant within time. Applications were made before this court as C. M. P. Nos. 1916 to 1918 of 1991 by the legal representatives of the first appellant-first defendant to get themselves impleaded as additional appellants in the Second Appeal. By order dated 7-7-1992 the said applications were allowed by this court on terms. The legal representatives of the deceased first appellant-appellants 2 and 3 did not comply with the condition imposed by this court. This resulted in the rejection of those applications and though not strictly necessary a further order was passed by this court on 25-9-1992 dismissing those applications. The result is that the decree of the lower appellate court as against the deceased first appellant first defendant has become final. At the hearing it was submitted that in view of the fact that the Second Appeal has abated as against the first appellant-first defendant the entire appeal abates and that it cannot be proceeded with. This is controverted by the learned counsel for the surviving appellants-defendants 2 and 4 and it now falls to be considered as to whether the Second Appeal has abated or not.

2. The learned counsel for the appellant submits that defendants 2 and 4 were not claiming under the first defendant nor were they claiming jointly with the first defendant. According to the learned counsel therefore even though the decree against the first defendant may have become final, defendants 2 and 4 are entitled to proceed with the Second Appeal especially in view of Rule 4 of Order 41 of the Code of Civil Procedure. He submits that the fact that defendants 2 and 4 had a defense which was common to the first defendant namely the denial of title of the plaintiff on the basis of the basic partition in Kovil Vilakathu veedu that would not normally affect their entitlement to continue with the Second Appeal and to get a reversal of the decree of the lower appellate court notwithstanding the death of the first defendant pending this Second Appeal.

3. The learned counsel for the appellant places considerable reliance on the decision of the Supreme Court in Lal Chand (Dead) by Lrs. and Others Vs. Radha Krishan, to contend that notwithstanding the fact that the deceased first defendant was a party appellant in the Second Appeal and notwithstanding the fact that his legal representatives were not impleaded in the Second Appeal, the Second Appeal could be maintained by the surviving appellants that is defendants 2 and 4 by invoking Rule 4 of Order 41 of the Code of Civil Procedure. He points out that in the case before the Supreme Court one of the

appellants had died while the appeal was pending before the lower appellate court and it was found that nothing survives to his legal representatives at since he was only a statutory tenant and therefore the legal representative could not be impleaded. Thereafter it was held by the appellate court that even as against the two other appellants who denied the claim for eviction made by the landlord it could not proceed with the appeal in view of the death of one of the appellants and the inability to implead the legal representatives of that appellant. The High Court also affirmed that decision and when the matter was taken to the Supreme Court, their Lordships applied Order 41 Rule 4 of the CPC to hold that the appeal before the appellate court could be continued notwithstanding the death of one of the appellants and the non-impleading of his legal representatives. The learned counsel for the appellant specifically refers to paragraph 8 of the judgment where in it has been held by the Supreme Court as follows:

Not only was it erroneous to treat the appeal as having abated on the death of Lal Chand but the first appellate Court as well as the High Court ought to have applied the provisions of Order XLI r 4, Code of Civil Procedure, under which 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 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. On the death of Lal Chand during the pendency of the first appeal the other appellants, who were as much interested in the success of the appeal as Lal Chand, were before the Court and the appeal could not have been dismissed for the mere reason that Lal Chand had no longer any interest or estate in the property. The eviction decree being joint and indivisible, the dismissal of the appeal in so far as Lal Chand was concerned could conceivably result in inconsistent decrees being passed in the event of the appeal of Kesho Ram and Jhangi Ram being allowed. Therefore, the first appellate Court ought to have heard the appeal on merits and decided the question whether the provisions of the Slum Clearance Act operated as a bar to the maintainability of the suit brought by the respondent.

According to the learned counsel for the appellant the decree declaring title and possession and fixing the boundary in this case being joint and indivisible, the dismissal of the Second Appeal as abated in so far as the first appellant is concerned would not in any way preclude appellants 2 and 3 from proceeding with the appeal in the light of the observations of the Supreme Court.

4. I find considerable difficulty in reconciling the decision reported in Lal Chand's case with a clear proposition laid down by their Lordships of the Supreme Court in the decision reported in Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others, where in their Lordships had categorically stated that Order 41 Rule 4 of the Code could not be applied in a case where one among several appellants dies during the pendency of the appeal. After referring to the

decisions of the various High Courts, their Lordships observed thus:

We do not consider it necessary to discuss the cases referred to at the hearing. Suffice it to say that the majority of the High Courts have taken the correct view, that the appellate Court has no power to proceed with the appeal and to reverse and vary the decree in favour of all the plaintiffs or defendants under O. XLI, r. 4 when the decree proceeds on a ground common to all the plaintiffs or defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned under O. XXII, r.3.

The decision of their Lordships in Rameshwar Prasad's case is not seen to have been brought to their Lordships notice in the decision in Lal Chand's case. The effect of non-impleading of the legal representatives of one of the appellants who dies pending the appeal has been considered by his Lordship Justice P. Subramonian Poti as he then was in S. A. No. 761 of 1968, reported as Short Notes to 1971 KLTSN 50. After considering the decisions of the Supreme Court reported in *State of Punjab v, Nathu Ram* (A. I. R. 1962 SC 89), *Rameshwar Prasad and Others Vs. Shyam Beharilal Jagannath and Others*, and the decision in *Ratan Lal Shah v. Firm Lamandas Chhedammalal and Anr.* (1969 I S. C. W. R. 1978) his lordship Justice Poti, after quoting the following passage from *Rameshwar Prasad's* case, namely:

It will be against the scheme of the Code to hold that R.4 of O 41 empowered the Court to pass a decree in favour of the legal representatives of the deceased Kedar Nath on hearing an appeal by the surviving appellants even though the decree against him has become final.

held as follows:

That will not be the case where all the plaintiffs or defendants as the case may be, have jointly filed the appeal. In such a case on the death of any one or more of the appellants, the surviving appellants cannot seek to obtain a decree reversing or varying the decree in favour of all the plaintiffs or defendants, as the case may be. It would also follow that if there cannot be a decree varying the decree in its entirety the surviving appellants cannot obtain a decree for themselves in the appeal reversing or modifying the decree of the lower court. That is, because, it would, then mean a different decision in their favour in the appeal than the one reached or deemed to have been reached in regard to the appellant as against whom the appeal abates. It would lead to conflicting decisions.

In the light of the decision in *Rameshwar Prasad's* case I am in respectful agreement with the views expressed by His Lordship Justice Subramonian Poti. In the light of the decision reported in *Rameshwar Prasad's* case rendered by three learned judges, it is not possible for this court to follow the decision reported in *Lal Chand's* case rendered by two learned judges, in view of the consistent view expressed by the Supreme Court that in the case of conflict between two decisions of the Supreme Court, this court has to follow the decision

that is rendered by more number of Judges. (See The State of U.P. Vs. Ram Chandra Trivedi,

5. In the view I have taken it is not necessary for me to refer to the decision of Calcutta High Court reported in Santosh Kumar Mondal and Others Vs. Nandalal Chakrapani and Others, which unfortunately had not been brought to the notice of their Lordships while deciding Rameshwar Prasad's case. It also appears to me in this case that the defence raised by defendants 1, 2 and 4 the appellants in this Second Appeal was on the basis of rights derived by them under the same document and that in effect they were putting forward a common defence against the respondent-plaintiff on the question of title and possession. The effect of my allowing this Second Appeal without the legal representatives of the deceased first appellant being on the array of parties would be to pass a decree which will directly conflict with the decree that has been passed by the lower appellate court against the deceased first appellant which has become final as against his legal representatives. I am therefore of the view that in the present case the Second Appeal cannot be proceeded with on the merits in view of the death of the first appellant and the failure to implead the legal representatives in this Second Appeal.

I therefore declare the above S. A. has abated.