

(1961) 12 KL CK 0028
In the High Court Of Kerala
Case No : A.S. No. 207 of 1956 (T)

Subramonian Nadar Padmanabhan Nadar	APPELLANT
Vs	
Chinnan Nadar Chellakkan Nadar and Others	RESPONDENT

Date of Decision : 04-12-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 12

Citation : AIR 1963 Ker 5

Hon'ble Judges : M.S. Menon, Acting C.J.; S. Velu Pillai, J; C.A. Vaidialingam, J

Bench : Full Bench

Advocate : K.N. Narayanan Nair and N. Sudhakaran, for the Appellant; T.S. Krishnamoorthi Iyer and P.H. Sankaranarayana Kukiliya, for the Respondent

Final Decision : Dismissed

Judgement

C.A. Vaidialingam, J.—In this appeal on behalf of the defendant-appellant, Mr. K. N. Narayanan Nair, learned counsel, challenges the decree and judgment of our learned brother, Mr. Justice Joseph, restoring the decree of the trial court.

2. The matter was referred for decision by a Full Bench in view of the fact that certain principles laid down by a Division Bench judgment of the Travancore-Cochin High Court reported in *V. Acha v. Maravanthurutnu Pakuthy* 1949 KLT 1: AIR 1950 TC. 1 and followed by the learned Judge, in the disposal of the second appeal have been overruled by a subsequent Full Bench of the Travancore-Cochin High Court reported in *Chacho Pyti v. type Varghese* 1955 KLT 739: AIR 1956 TC. 147 . The correctness of the latter decision of the Full Bench was challenged by Mr. T. S. Krishnamoorthi Iyer, learned counsel for the plaintiff-respondent. In view of this attack made against the Full Bench judgment as such, it was considered necessary to consider this appeal by a Full Bench of this court and that is why the matter has come before us.

3. A few facts may be stated in order to appreciate the circumstances under which the second appeal came to be filed in this court. The plaintiff appears to

have obtained a mortgage decree against one Vedakannu Nadar and there is no controversy that items 1 to 5 were mortgaged by the said Vedakannu Nadar in favour of the plaintiffs' father. In execution of the decree obtained by the plaintiffs to enforce the rights under the mortgage, namely, O. S. No. 192 of 1109, they took out proceedings in execution for getting delivery of the properties. It is also seen that in execution of the personal decree that they had obtained against Vedakannu Nadar the plaintiffs had also attached certain other properties of the mortgagor apart from the properties mortgaged, namely, items 6 to 18.

4. The date of the decree In O. S. 192 of 1109 is 29-3-1109 as will be seen from the copy of the decree, Ex. E. It is also seen that this Vedakannu Nadar was an accused In a criminal case, having been charged with committing the murder of his wife, and he was tried by the appropriate criminal courts and ultimately sentenced to be hanged by the neck and the sentence itself was carried out on 15-4-1109.

5. Therefore, it will be seen that Vedakanntr Nadar was executed after the date of the decree, Ex. E, obtained by the plaintiffs.

6. In the proceedings taken by the plaintiffs for executing the decree they brought on record Kannammal, daughter of the said Vedakannu Nadar. There can be no doubt that at the time she was the only legal heir of Vedakannu Nadar.

7. Execution proceedings were continued with Kannammal on record and ultimately the properties were purchased by the plaintiffs as will be seen from the sale certificate, Ex. F, dated 13-11-1119. The plaintiffs attempted to take possession of the properties purchased by them In execution of the decree but the defendant caused obstruction. The defendant claimed rights in respect of the properties which were the subject of execution proceedings under a will, Ex. 1, stated to have been executed by Vedakannu Nadar on 31-12-1104 and it was his contention that inasmuch as proceedings in execution had not been taken by impleading him on record, the entire execution proceedings should be declared null and void and they are not binding as against him or as against the properties to which he has become entitled on the basis of the will, Ex. I. The executing court upheld the claim made by the defendant and overruling the objections of the plaintiffs dismissed the execution petition for granting possession of the properties.

8. The plaintiffs in turn instituted the present suit out of which this appeal now arises for setting aside the order passed by the executing court under Ex. A dated 18-7-1120.

9. The main controversy in the suit was as to whether there has been a proper representation of the estate of Vedakannu Nadar in execution proceedings by his daughter being brought on record as his legal representative.

10. The trial court accepted the case of the plain-tiffs and held that inasmuch as

the daughter of Vedakannu Madar was the legal heir and who was in complete possession of the entire properties of Vedakannu Nadar, the proceedings taken in execution by impleading her as the legal representative of the deceased person was quite proper and in this view negated the defence raised by the defendant that the proceedings were not binding as against him.

11. There is also one other-finding in the decree of the trial court to the effect that the defendant himself was not aware of either the execution of the will by Vedakannu Nadar in his favour on 31-2-1104 or of his being entitled to any rights under that will. But there is another finding to the effect that the defendant was aware of some rights under the will in or about 1111, but he took no steps whatsoever to intervene in execution proceedings and therefore he has no right to ask for the proceedings being held invalid so far as he is concerned. It is thus that the trial court decreed the suit.

12. There was an appeal against the decree and judgment of the trial court and the appellate court reversed the decree of the trial court on the ground that the estate could not be said to have been properly represented inasmuch as the defendant was not made a party in the execution proceedings, at any rate, so far as items 6 to 18 were concerned. But so far as plaint items 1 to 5 which were the subject of the mortgage were concerned, even the appellate court was prepared to accept the contention of the plaintiff that the question of representation or improper representations does not arise because there was already a charge created by the decree of the trial court

13. But so far as items 6 to 18 were concerned, the appellate court reversed the decree of the trial court and held in favour of the defendant.

14. Both the plaintiff and the defendant appear to have filed second appeals attacking that part of the judgment of the appellate court which was against them.

15. Our learned brother, Mr. Justice Joseph ultimately has reversed the decree of the appellate court and restored that of the trial court. That is, the plaintiffs' suit has been decreed. The learned Judge is of the view that the plaintiffs had taken proceedings in execution by impleading Kannammal bona fide and were not aware of the rights of any person like the defendant under the will stated to have been executed by Vedakannu Nadar. Our learned brother is also of the view that on the date when execution proceedings were commenced by the plaintiffs Kannammal was in possession of the properties and she has also taken all defences available to her in respect of the proceedings taken in execution. Our learned brother is also of the view that the case of the defendant that he has been in possession of the property cannot be accepted and in fact the view of the learned Judge is that the defendant was not in possession of the properties while the execution proceedings were going on.

16. After recording these findings on facts as against the defendant and in favour of the plaintiffs, our learned brother has come to the conclusion that in the

circumstances of this case it cannot be stated that there has been no proper representation of the estate of Vedakannu Nadar in execution proceedings. No doubt, it is also seen that our learned brother has placed reliance upon the Division Bench ruling of the Travancore Cochin High Court reported in 1949 KLT 1: AIR 1950 TC. 1 which relates to the question as to whether there can be in law a substantial representation of the estate of a person in execution proceedings. The learned Judge after referring also to the decision of the Privy Council in *Malkarjun v. Naraharl* ILR 25 Bom 357 and certain other decisions has ultimately come to the conclusion that the plaintiffs' suit must be decreed as prayed for.

17. It is this judgment of our learned brother that is attacked by Mr. K. N. Narayanan Nair, learned counsel for the appellant.

18. Mr. K. N. Narayanan Nair, learned counsel, urged that the decision in 1949 KLT 1: AIR 1950 TC 1 mainly on the basis of which our learned brother has come to the conclusion that the representation of Vedakannu Nadar's estate is proper by the impleading of his daughter as legal representative cannot be sustained in view of the fact that the said Division Bench Ruling has been overruled by a later Full Bench decision of the Travancore-Cochin High Court reported in 1955 KLT 739 : AIR 1956 TC. 147 . That the decision in 1949 KLT 1: AIR 1950 TC. 1 has been overruled is a fact by the later Full Bench decision referred to above cannot be controverted. In fact, Mr. T. S. Krishnamoorthi Iyer, learned counsel for plaintiffs-respondents, does not also challenge the fact that the earlier decision has been overruled by the later Full Bench decision. But Mr. T. S. Krishnamoorthi Iyer, learned counsel, urges that the views expressed by the Full Bench in 1955 KLT 739: AIR 1956 TC. 147 are erroneous and has to be reconsidered by this Court.

19. If the point directly arises for consideration about the correctness or otherwise of the decision of the learned Judges of the Full Bench in 1955 Ker LT 739: AIR 1956 TC. 147, the matter, in our opinion, will have to be considered very carefully and rather exhaustively also after having due regard to the various decisions governing this matter, some of which are Privy Council decisions also. But in our view in this case the question of substantial representation or otherwise does not at all arise in view of the categorical findings recorded by the trial court as against the defendant-appellant and accepted by our learned brother Mr. Justice Joseph in the second appeal. No doubt, there was an attempt by Mr. K. N. Narayanan Nair to challenge the findings recorded by our learned brother. We are not certainly inclined to permit an argument on a finding of fact recorded by our learned brother in this further appeal.

20. We are also satisfied that the findings arrived at by the learned judge on facts are amply borne out by the materials available on record.

21. Both the decision in 1949 KLT 1: AIR 1950 TC. 1 and the later Full Bench decision in 1955 KLT 739: AIR 1956 TC. 147 (FB) were passed under different

circumstances, the question as to whether when admittedly there were certain persons who were owners of the properties as co-owners the impleading of only some of them can be stated to be a representation of the enure estate. That question does not at all arise before us because as we have mentioned earlier there is no question of substantial representation of the estate of Vedakannu Nadar arising for consideration in this appeal.

22. There is no controversy that Kannammal, the daughter of Vedakannu Nadar, was the legal heir but for the will that no doubt appears to have been executed by the deceased under Ex. I, The plaintiffs were not aware of the execution of any will nor were they aware of the rights of the defendant at the time they brought on record the daughter of Vedakannu Nadar. There is also the further finding that the daughter of Vedakannu Nadar, who was his legal heir, was in actual possession of the properties and the findings are also to the effect that the defendant had no possession of the properties at the time when execution proceedings were taken and when Kannammal was impleaded as the legal representative of the deceased Vedakannu Nadar. It is rather curious that the person now contesting the execution proceedings, basing his rights on Ex. I executed by Vedakannu Nadar was himself, even according to his own evidence, not aware at all of the execution of the will or of his rights under the will at all, any rate, till 1111. Even after becoming aware of his rights under the will though execution proceedings were being taken he never chose to intervene and contest the execution proceedings which were being continued as against the daughter of Vedakannu Nadar. The further finding also is that the plaintiffs were continuing the execution proceedings bona fide and without any fraud or collusion between him and the person who was on record, namely, the daughter of Vedakannu Nadar. Therefore, we will only wind up the discussion on this aspect by repeating what we have stated earlier, namely, the question of substantial representation of the estate or otherwise does not arise in these proceedings in view of the very specific and categorical findings recorded by the trial court as against the defendant and accepted by our learned brother. It follows that in the circumstances of this case the plaintiffs acted correctly and properly in impleading the legal heir of Vedakannu Nadar who was in possession of the properties left by the deceased.

23. The decree and Judgment of our learned brother are confirmed and this appeal dismissed.

24. The parties will bear their own costs in this appeal.