

(2010) 09 KL CK 0222

High Court Of Kerala

Case No: Writ Petition (C) No. 27340 of 2010 (O)

Sulochana

APPELLANT

Vs

Thilakavathy and
Others

RESPONDENT

Date of Decision: Sept. 3, 2010

Hon'ble Judges: Thomas P. Joseph, J

Bench: Single Bench

Advocate: P.R. Venketesh, for the Appellant; No Appearance, for the Respondent

Final Decision: Dismissed

Judgement

Thomas P. Joseph, J.

Legal representatives of deceased defendant No. 1 have filed this Writ Petition challenging Ext.P1, order dated 24.07.2010 in E.P. Nos. 144 of 2005, 148 of 2007, 161 of 2007 and 162 of 2007 in O.S. No. 225 of 1976 of the court of learned Sub Judge, Palakkad. That is a suit for partition where a preliminary decree followed by a final decree was passed. The final decree is under challenge in R.F.A. No. 338 of 2006. Respondent No. 6 filed execution petition seeking delivery of property. That was objected by petitioners on various grounds including that some of the parties to the final decree died in the meantime, final decree was passed with dead persons on record, their legal representatives were not impleaded on time and that impleadment itself was without setting aside the abatement. It was contended that since the final decree was passed against dead persons as well it is void. Objections were rejected by the learned Sub Judge. Hence this Writ Petition.

2. It is relevant to refer to the facts of the case to decide the controversy. The property belonged to the late Mallunni. Plaintiff and defendant Nos. 2 to 5 are his daughters. Defendant No. 1 is his son and defendant No. 6 is the widow of Mallunni. Defendant No. 7 is the step-mother of Mallunni. On the death of defendant No. 7, her legal representatives were impleaded as defendant Nos. 9 to 12. Defendant No. 8 was impleaded on account of pendency of the ceiling case concerning the suit

property. With the above parties on record a preliminary decree was passed on 31.10.1978. As per that preliminary decree plaintiff and defendant Nos. 3 to 5 got 1/28th share each in plaint A schedule while defendant No. 2 got 22/28th shares. Defendant No. 6 was to get 2/28th shares (which included the share of defendant No. 2 which was assigned to defendant No. 6). Plaintiff and defendant Nos. 1 to 5 were got 1/7th share each in plaint B schedule. Defendant No. 6 was also got 2/7th shares in plaint B schedule. Plaintiff and defendant No. 1 died after passing of the preliminary decree. Legal representatives of plaintiff filed I.A. No. 454 of 1993 for passing final decree. Legal representatives of defendant No. 1 were impleaded as respondent Nos. 2, 13 and 16 in the application for passing final decree. Defendant No. 2 was impleaded as respondent No. 3 in I.A. No. 454 of 1993. Defendant No. 2 remained exparte. Final decree was passed on 26.02.2003. After the final decree E.P. No. 144 of 2005 was filed. At that stage defendant Nos. 3, 9 and 12 died. Their legal representatives were not impleaded within time. Later the legal representatives were impleaded. The contention raised is that impleadment of legal representatives of respondent Nos. 3, 9 and 12 was after the appeal abated and hence it is void. Learned Sub Judge has held relying on the decisions in [Mithailal Dalsangar Singh and Others Vs. Annabai Devram Kini and Others](#), and [Ramdas Shivram Sattur Vs. Rameshchandra Popatlal Shah and Others](#), that when impleadment is allowed it follows that the abatement stood set aside. There is no reason to interfere with that view.

3. Another objection is that the final decree was passed against a dead person (defendant No. 3 in the final decree) as well and hence that final decree is null and void. Defendant No. 3 referred to in the final decree is defendant No. 2 who died on 10.05.1999 when the application for passing final decree was pending. Her legal representatives were not impleaded before passing final decree. The question is whether for non impleadment of legal representatives of defendant No. 2 the final decree is said to be void.

4. This Court in *Madhavi Amma v. Lookkose and Anr.* 1977 KLT 279 has held that death of one of the parties after passing of preliminary decree does not involve abatement of the suit. That apart, it is to be noted that even in the final decree no share was allotted to defendant No. 2 (though the Advocate Commissioner has allotted a share to defendant No. 2 also) since the share of defendant No. 2 has been assigned to defendant No. 6. Thus defendant No. 6 is the legal representative of defendant No. 2. The contention that since legal representatives of deceased defendant No. 2 were not brought on record the final decree is void cannot be accepted. It is apposite to refer to the observation in [Bhagwan Swaroop and Others Vs. Mool Chand and Others](#), . There, a preliminary decree was passed in a suit for partition. During the pendency of the appeal some of the respondents died and their legal representatives were not brought on record within the time specified. Application for impleadment of legal representatives was filed beyond the prescribed time. That application was dismissed by the High Court. Apex Court held

that the order of High Court disclosed a hyper-technical approach which if carried to end may result in miscarriage of justice. Having regard to the facts and circumstances I do not find any legal infirmity in the final decree requiring interference. Nor can it be said that impleadment of legal representatives of deceased respondents after the prescribed time was illegal. I do not find reason to interfere with Ext.P1, order passed by the learned Sub Judge.

Writ Petition is dismissed.