

(1963) 02 KL CK 0017

High Court Of Kerala

Case No: C.R.P. No. 1162 of 1962

Kunjan and Another

APPELLANT

Vs

Kochuntan and Others

RESPONDENT

Date of Decision: Feb. 8, 1963

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 4(2), 47

Citation: (1963) KLJ 633

Hon'ble Judges: P.T. Raman Nayar, J

Bench: Single Bench

Advocate: K.C. John, for the Appellant; S. Bhoothalinga Iyer, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Raman Nayar, J.

This case raises a problem for which I am afraid I am unable to find a really satisfactory solution. It is the problem of the legal representative of a deceased defendant who, on coming on record, wishes to assert an independent title of his own to the property in suit. The orthodox view is that he cannot be allowed to do so and must bring a separate suit though perhaps he may, if the original defendant has not laid claim to the property since a defense of jus tertii would have been a defense open to him because under Order XXII, Rule 4(2), the defense he is permitted to take is restricted to a defense appropriate to his character as legal representative of the deceased defendant, although, why he should be driven to a separate suit when he wishes to have the matter decided in a suit to which he is already a party, and why he should be put to the disadvantage of having to figure as a plaintiff in a subsequent suit by the accident of his being the legal representative of the defendant in the suit already brought, is more than I can see. Nor am I so sure-and I say this with great respect to the decisions in AIR 1939 178 (Lahore) and

[Dareppa Alagouda Vs. Mallappa Shivalingappa](#), -that section 47, CPC would not be a bar to a fresh suit. The legal representative is undoubtedly a party to the suit although impleaded only in his character as a legal representative, and, if the plaintiff obtains a decree and seeks to get possession of the property in execution, the plea that the property did not belong to the deceased defendant but belonged to the legal representative in his own independent right would, I think, raise a question between the parties to the suit in which the decree was passed, relating to the execution, discharge or satisfaction of the decree. And I do not think that as was assumed in the decisions to which I have referred, in adjudicating on such a plea the Executing court would be going behind the decree or inquiring into its Validity. It would only be construing the decree and determining what the property is that is to be delivered thereunder. For, the decree is really against the legal representative in his capacity as such and is, in terms, executable only against property which he holds in that capacity. To invite the executing court to hold that the legal representative does not hold the property under the deceased defendant but holds it in his own right so that the decree does not bind him to deliver the property is not, I think, to invite it to go behind the decree or to hold that the decree is not valid. It is only inviting the court to hold that the decree, properly construed, does not cover the property in so far as it is held by the legal representative in his own independent title and not under the deceased defendant. If, as I apprehend, the matter has to be agitated (and decided) in execution, I think it is far better agitated (and decided) in the suit itself.

2. The solution that suggests itself to me is that, whenever a person who has been impleaded as the legal representative of a deceased defendant wishes to set up his own independent title, the court, should implead him not merely as legal representative but also in his own personal capacity. Then, according to what is implied where it is not expressly stated, in all the authorities AIR 1924 45 (Lahore) [K.P.K. Thambatti Thamburathi \(deceased\) and Others Vs. K.V.T. Taravathi Karnavan Sankara Menon and Others](#), ; [Kizhiakalathil Puthan Veetil Thavazhi Karnavan Vs. Manikat Variath Ukkali Varissiar's son Sankunni and Others](#), ; Ram Ugrah Ojha v Ganesh Singh (I. L. R. 1940 Allahabad 153) and [Dareppa Alagouda Vs. Mallappa Shivalingappa](#), he can agitate his own title untrammelled by the limitation placed upon him by Order XXII, Rule 4(2) in his capacity as a mere legal representative. And this I think, is precisely what has happened in the present case. The petitioners, defendants 2 and 4, are the sons of the deceased defendant. They are indisputably his legal representatives even if it be that they do not claim the property in suit under him, and they were impleaded as such without demur. Their contention that they are not legal representatives of the deceased defendant is therefore without substance. But, after they were made parties to the suit, they filed written statements setting up independent title in themselves, and in the presence of the plaintiffs, issue was joined in respect of the independent title which these defendants set up. It must therefore be assumed that the position was accepted on

all hands, by the parties and by the court, that these defendants were on the party array not merely as legal representatives of the deceased defendant but in their own personal capacity as well. Therefore, I do not think that it was open to the plaintiffs at a later stage of the suit to ask the court to strike out the issues joined in respect of these defendants' independent title and I think that, in acceding to their request, the court below acted with material irregularity in the exercise of its jurisdiction. I allow this petition with costs. The order of the lower court striking out the issues is set aside and the lower court is directed to make a record of the fact that defendants 2 and 4 are on the party array not merely as the legal representatives of the deceased defendant but also in their own personal capacity.