

Ajayakumar vs Jyothi

Ajayakumar vs Jyothi

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Court : Kerala

Decided On : Jun-22-2022

Judge : Honourable Mr. Justice P.Somarajan

Appeal No. : FAO (RO)/206/2016

Appellant : Ajayakumar

Respondent : Jyothi

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.SOMARAJAN WEDNESDAY,
THE 22nd DAY OF JUNE 2022 / 1ST ASHADHA, 1944 FAO (RO) NO. 205 OF
2016 AGAINST THE JUDGMENT DATED 04.02.2016 IN AS No.397/2015 OF II
ADDITIONAL DISTRICT COURT, THIRUVANANTHAPURAM

**JUDGMENT AND DECREE DATED 17.06.2015 IN OS No.1148/2005
OF III**

ADDITIONAL MUNSIFF COURT, THIRUVANANTHAPURAM
APPELLANTS/RESPONDENTS 2 TO 5/ADDITIONAL PLAINTIFFS 2 TO 5: 1
AJAYAKUMAR, AGED 57 YEARS, S/o T.SREEENIVASAN ACHARY, RESIDING
AT POOVATHUR HOUSE, THAZHASSERY, PETTAH VILLAGE,

THIRUVANANTHAPURAM. 2 ANIL KUMAR, AGED 55 YEARS, S/o T.SREENIVASAN ACHARY, RESIDING AT POOVATHUR HOUSE, THAZHASSERY, PETTAH VILLAGE, THIRUVANANTHAPURAM.

3 SUSHAMA SYRANTHRI.S., AGED 53 YEARS, D/o T.SREENIVASAN ACHARY, RESIDING AT POOVATHUR HOUSE, THAZHASSERY, PETTAH VILLAGE, THIRUVANANTHAPURAM.

4 ASHA S., AGED 50 YEARS, D/o T.SREENIVASAN ACHARY, RESIDING AT POOVATHUR HOUSE, THAZHASSEERY, PETTAH VILLAGE, THIRUVANANTHAPURAM. BY ADVS. SRI.GOPAKUMAR R.THALIYAL SRI.R.B.RAJESH RESPONDENTS/1st APPELLANT, 6th RESPONDENT, APPELLANTS 2 TO 5/DEFENDANTS: 1 JYOTHI, AGED 53 YEARS, D/o LATE DAMAYANTHI, RESIDING AT PRRA-23, PUTHEN ROAD, PETTAH, THIRUVANANTHAPURAM, PIN - 695 024. 2 PRABHAKARAN, AGED 61 YEARS, PROPRIETOR, CITY BANK, RESIDING AT PRRA-23, PUTHEN ROAD, PETTAH, THIRUVANANTHAPURAM, PIN - 695 024. FAO (RO) Nos.205 & 206 of 2016 2 3 RAJENDRAN, AGED 67 YEARS, D/o LATE MADHAVAN, RESIDING AT KOTTUVILAKOM PURAYIDAM, PUTHEN ROAD, PETTAH, THIRUVANANTHAPURAM, PIN - 695 024.

4 PREETHA, AGED 50 YEARS, D/o LATE DAMAYANTHI, RESIDING AT ANAND BHAVAN, PAZHAYA ROAD, MEDICAL COLLEGE (P.O.), THIRUVANANTHAPURAM, PIN - 695 024.

5 LATHA, AGED 46 YEARS, D/o LATE DAMAYANTHI, RESIDING AT KOTTUVILAKOM PURAYIDAM, PETTAH, THIRUVANANTHAPURAM, PIN - 695 024. 6 LEKHA, AGED 43 YEARS, D/O LATE DAMAYANTHI, RESIDING AT KOTTUVILAKOM PURAYIDAM, PETTAH, THIRUVANANTHAPURAM, PIN - 695 024. R5 BY ADVS. SMT.ANITHA RAVINDRAN SRI.HARISANKAR N UNNI SMT.T.RESHMA SRI.B.S.SWATHI KUMAR SMT.S.SIKKY THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING COME UP FOR HEARING ON 22.06.2022, ALONG WITH FAO (RO).206/2016, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: FAO (RO) Nos.205 & 206 of 2016 3

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE P.SOMARAJAN WEDNESDAY,
THE 22nd DAY OF JUNE 2022 / 1ST ASHADHA, 1944 FAO (RO) NO. 206 OF
2016 AGAINST THE JUDGMENT DATED 04.02.2016 IN AS No. 398/2015 OF II
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**JUDGMENT AND DECREE DATED 17.06.2015 IN OS No.1148/2005
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POOVATHUR HOUSE, THAZHASSERY, PETTAH HOUSE,
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SRI.R.B.RAJESH RESPONDENTS/1st APPELLANT, 6th RESPONDENT,
APPELLANTS 2 TO 5/DEFENDANTS: 1 JYOTHI, AGED 53 YEARS, D/o LATE
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D/o LATE MADHAVAN, RESIDING AT KOTTUVILAKOM PURAYIDAM, PUTHEN
ROAD, PETTAH, THIRUVANANTHAPURAM, PIN- 695 024. 4 PREETHA, AGED

50 YEARS, D/o LATE DAMAYANTHI, RESIDING AT ANAND BHAVAN, PAZHAYA ROAD, MEDICAL COLLEGE (PO), THIRUVANANTHAPURAM, PIN-695 024.

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JUDGMENT

The additional plaintiffs 2 to 5 came up against the order of remand passed by the first appellate court directing adjudication of the question of undervaluation and the court fee payable at the first instance. The operative portion of the order of remand passed by the first appellate court (Additional District Judge), is extracted below for reference:

25. In the result, both appeals are allowed. The decree and common judgment of the court below are set aside. The matter is remitted back to the court below for fresh consideration after providing opportunity to the plaintiffs/respondents to file an amendment application regarding valuation of the relief of declaration and for paying proper court fee. On finding the valuation of the relief of declaration based on the market value of the property, if the learned Munsiff loses pecuniary jurisdiction, the learned Munsiff shall pass appropriate orders to get the case considered by court having pecuniary jurisdiction. If the court below is found to be having pecuniary jurisdiction on amendment, the court below is directed to dispose of the matter afresh. It is made clear that both parties are at liberty to adduce further/fresh evidence. Both parties are

directed to appear before the court below on 03.03.2016. Considering the nature of this case, both parties are directed to suffer their respective costs in these appeals.

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2. The abovesaid direction issued by the first

appellate court prima facie appears to be against the settled legal position governing the area. In fact, the first appellate court has committed a serious error by setting aside the decree and judgment of the trial court and by ordering remand for the purpose of fresh assessment of market value of property and for payment of deficit court fee. It is a suit for declaration of title and injunction. A counter claim was also raised in the suit. No issue was settled by the trial court for adjudication of deficiency of court fee or to ascertain the correctness of the valuation made in the suit. The allegation is that after the amendment of suit by incorporating substantial prayer for declaration, it was not valued for the purpose of court fee and no court fee was paid and it was noticed at the first appellate stage and hence, an order of remand was passed for that purpose.

3. The question of undervaluation of suit or the

relief subsequently amended was not taken up or FAO (RO) Nos.205 & 206 of 2016 7 adjudicated at the trial stage either at the initial stage or at the final stage of the suit. Necessarily, it has to be ascertained that (1) whether it is permissible to take up the issue of undervaluation of suit and deficiency of court fee at the final stage of the suit and what would be the legal position, if it was not taken up and adjudicated as a preliminary issue before the court of first instance (2) whether the court of appeal can go into the said question of undervaluation or deficiency of court fee payable at the first instance (trial court) when an appeal comes before it against the decree and judgment of the trial court adjudicating the dispute inter se between the parties (3) what would be the jurisdiction of the court of appeal when it is found that the suit is undervalued and there is deficit court fee at the court of first instance (trial court) (4) when the appeal is against the decree and judgment adjudicating the respective right of parties, whether it is permissible to order

remand of the matter for the determination of question of undervaluation and FAO (RO) Nos.205 & 206 of 2016 8 deficit court fee payable at the court of first instance and (5) what is the procedure to be applied by the first appellate court in that situation.

4. The question of undervaluation of suit and

deficit court fee is a matter to be adjudicated as a preliminary issue so as to enable the party to make it good on its adjudication for which sufficient opportunity must be provided. When the question of undervaluation involves the question of pecuniary jurisdiction, the plaint has to be returned under

Order VII Rule 10 C.P.C. for proper presentation

before the court having the jurisdiction as per *lex fori* and *lex loci*. The question of rejection of plaint under clause (b) and (c) of Order VII Rule 11 C.P.C. would arise only when there is failure to make good the deficit court fee within the time allowed/specified by the court in that behalf. With respect to a suit instituted in any court other than the High Court, the court has to decide the question of undervaluation based on the materials and FAO (RO) Nos.205 & 206 of 2016 9 allegations contained in the plaint in accordance with the mandate under Section 12 of the Kerala Court Fees and Suits Valuation Act, 1959, which is extracted below for reference :

12. Decision as to proper fee in other Courts.- In every suit instituted in any Court other than the High Court, the Court shall before ordering the plaint to be registered, decided on the materials and allegations contained in the plaint and on the materials contained in the statement, if any, filed under section 10, the proper fee payable thereon, the decision being however subject to review, further review and correction in the manner specified in the succeeding sub- sections. (2)Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub- section, not later, plead that the subject-matter of

the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decides that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the courts decision and the deficit fee shall be paid. If the plaint be not amended or if

FAO (RO) Nos.205 & 206 of 2016 10 the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such

order as it deems just regarding costs

of the suit.

(3) A defendant added after issues have

been framed on the merits of the claim may, if the court so permits, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim, and if the Court finds that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient the Court shall follow the procedure laid down in sub- section (2).

Explanation.-Nothing in this sub-section shall apply to a defendant added as a successor or a representative in interest of a defendant who was on record before issues were framed on the merits of the claim and who had an opportunity to file a written statement pleading that the subject matter of the suit was not properly valued or that the fee paid was not sufficient.

(4)(a) Whenever a case comes up before a Court of appeal, it shall be lawful for the Court, either of its own motion or on the application of any of the parties, to consider the correctness of any order passed by the lower Court affecting the fee payable on the plaint or in any other

proceeding in the lower Court and determine the proper fee payable thereon. Explanation.-A case shall be deemed to come before a Court of Appeal even if the appeal relates only to a part of the subject-matter of the suit. (b)If the

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Court of appeal decides that the fee paid in the lower Court is not sufficient, the Court shall require the party liable to pay the deficit fee within such time as may be fixed by it. (c)If the deficit fee is not paid within the time fixed and the default is in respect of a relief which has been dismissed by the lower Court and which the appellant seeks in appeal, the appeal shall be dismissed, but if the default is in respect of a relief which has been decreed by the lower Court, the deficit fee shall be recoverable as if it were an arrear of land revenue. (d)If the fee paid in the lower Court is in excess, the Court shall direct the refund of the excess to the party who is entitled to it. (5)All questions as to value for the purpose of determining the jurisdiction of courts arising on the written statement of a defendant shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. Explanation.-In this section, the expression merits of the claim refers to matters which arise for determination in the suit, not being matters relating to the frame of the suit, misjoinder of parties and causes of action, the jurisdiction of the Court to entertain or try the suit or the fee payable but inclusive of matters arising on pleas of res judicata, limitation and the like.

(emphasis supplied)

5. The mandate under Section 12 of the Act would

make it clear that the question of undervaluation and FAO (RO) Nos.205 & 206 of 2016 12 deficit court fee must be taken as a preliminary issue by the trial court and not at the final stage of the suit, that is, after recording the evidence. Further, it is

not permissible to take up the question of pecuniary jurisdiction at the final stage of the suit after recording evidence. The said question came up before a Full Bench of this Court in *We-Build Pvt. Ltd. v. C. Kamaleswaran* (1981 KLT 773) and laid down the legal position thus:

sub-section (2) and (3) of Section 12 of the Act make it clear that it is peremptory that the court hears and decides the questions of improper valuation of the suit and/or insufficiency of the court fee paid on the plaint before recording of evidence affecting the defendant on the merits of the claim, and that after the suit has entered the stage of recording of evidence affecting the defendant on the merits of the claim, the court cannot take up the said questions.

6. There may not be any change in the legal

position even if certain other reliefs were incorporated by way of amendment. If the amendment was allowed and carried out incorporating any new relief or any property over which a new relief was claimed by way of amendment, after recording the evidence or FAO (RO) Nos.205 & 206 of 2016 13 during the course of recording of the evidence, there may be a slight change in the legal position that the court on allowing such amendment shall proceed to consider the undervaluation of the relief claimed and deficit court fee before proceeding further with the suit. The amendment subsequently effected and omission to consider proper court fee by mistake are the two exceptions to the abovesaid general principle that it must be decided as a preliminary issue before recording evidence. When an amendment was made after recording evidence or during the course of evidence, the amendment itself give an authority to the court so as to consider the question of undervaluation or deficit court fee of the amended relief or the property over which the relief was subsequently claimed by way of amendment as a preliminary issue irrespective of the fact that evidence was commenced or recorded in the suit.

7. There may be occasion in which a particular

relief or a property over which a relief was claimed either by way of amendment or otherwise was not FAO (RO) Nos.205 & 206 of 2016 14 properly valued or non-payment of required court fee either by way of omission or due to inadvertent mistake and if the suit was proceeded without noticing the same by recording evidence, the suit shall not be dismissed on that ground, unless sufficient opportunity was given to rectify the mistake or the omission thereof. The question of rejection of plaint can hardly be applied in that situation, unless sufficient opportunity was given for payment of the required court fee or to apply under Order XXXIII C.P.C. to proceed with the suit as an indigent person. There is an exception to the abovesaid general rule that in the case of undervaluation, if it involves the question of pecuniary jurisdiction, on adjudicating the issue, the suit has to be returned for proper presentation before the court having jurisdiction over the matter. If it is after recording the evidence or during the course of evidence on an amendment, the evidence so recorded will form part of the evidence when re-submitted before the court having jurisdiction over the matter, as if it had been recorded by that FAO (RO) Nos.205 & 206 of 2016 15 court and the evidence so recorded can be transmitted to that court on the application of either of the parties. When there is no involvement of question of pecuniary jurisdiction, the court has to deal with the matter in accordance with the mandate under Order VII Rule 10 C.P.C.. If it was noticed after the pronouncement of judgment, the court can defer the drawing of decree till its payment. Sub-section (4) of Section 12 of the Kerala Court Fees and Suits Valuation Act deals with the power of the court of appeal whenever a case comes up for adjudication and it shall be lawful either of its own motion or on the application of any of the parties to consider the correctness of any order passed by the lower court affecting the fee payable on the plaint or in any other proceedings and determine the proper fee payable thereon. The said power of court of appeal can be exercised only on two occasions (1) when there is an omission to value any particular subject matter over which relief is claimed or an omission to value any relief claimed or any property over which a relief FAO (RO) Nos.205 & 206 of 2016 16 is claimed and (2) when it involves a question affecting the pecuniary jurisdiction which was taken as a ground of attack in the appeal. When such determination is arrived at by the court of appeal and if it is found that there is deficiency in the court fee, an opportunity should be given to

make it good.

8. Going by the legal position settled above, the

procedure to be applied by the first appellate court in the matter of determination or adjudication of undervaluation and deficit court fee payable at the court of first instance is to adjudicate the same based on the content of the plaint and valuation statement thereof and to allow the party to make good the deficit court fee by the time granted by the court in that behalf. An order of remand for that purpose overlooking the provisions under Rule 23, 23 A and 24 of Order XLI C.P.C. is not permissible. The wording used in Section 149 C.P.C. that shall have the same force and effect as if such fee had been paid in the first instance is illustrative of the jurisdiction to

be exercised by the first appellate court not to order

FAO (RO) Nos.205 & 206 of 2016 17 a remand for any adjudication of undervaluation and deficit court fee payable at the court of first instance. Section 149 C.P.C. is extracted below for reference:

149. Power to make up deficiency of court-fees.- Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance. (emphasis supplied)

9. It was also laid down by the Apex Court in

Mannan Lal v. Chhotaka Bibi [AIR 1971 SC 1374 = (1970) 1 SCC 769] that there should be a harmonious reading so as to give effect to the provisions contained under Section 149 C.P.C. with Section 4 of the Kerala Court Fees and Suits Valuation Act. Hence, the deficit court fee payable at the trial stage can be cured

at the first appellate stage and then it will have the effect of as if such fee had been paid in the first FAO (RO) Nos.205 & 206 of 2016 18 instance. Necessarily, the procedure to be adopted by the first appellate court is to adjudicate the issue and to give an opportunity to the party to make good any deficit court fee payable at the court of first instance. The payment, if any, made in compliance of the order of the first appellate court will have the effect as if such payment had been paid in the court of first instance. Hence, a remand of the matter for the said purpose is totally impermissible even in the case of an omission to pay the deficit court fee or to incorporate statement of valuation after the amendment or otherwise. But it shall not be a ruse or a device in the hands of the plaintiff who had notice regarding undervaluation and deficit court fee to go on with the suit without bringing the same to the notice of the court of first instance. If it is found mala fide, the courts are not justified in permitting the party to make it good at the first appellate stage. The Apex Court in Scheduled Caste Co-Op. Land Owning Society v. Union of India [(1991) 1 SCC 174] had dealt with such an illustrative situation wherein it was held that : FAO (RO) Nos.205 & 206 of 2016 19

to permit payment of deficit court fees for recovering enhanced compensation after a lapse of almost six years under its inherent jurisdiction would encourage the practice of not paying the court fee in the hope that as and when the valuation is determined in appeal, the jurisdiction of the court can be invoked under Section 151 of the Code of Civil Procedure, 1908 and the benefit of enhanced compensation can be reaped by making good the deficit court fee.

10. When there is deliberate attempt not to show

the actual valuation of the property or the court fee payable, the party cannot be permitted to seek safe haven under the umbrella of inherent power under Section 151 C.P.C. or under Section 149 C.P.C. or Section 4 or 12 of the Kerala Court Fees and Suits Valuation Act.

11. Earlier, the Apex Court in Rathnavarmaraj v.

Smt.Vimla (AIR 1961 SC 1299) had the occasion to consider the question pertaining to Section 12(2) of Madras Court Fees and Suits Valuation Act (14 of 1955). Section 12 (2) of the said Act is pari materia with that of Section 12(2) of the Kerala Court Fees and Suits Valuation Act except the portion, but FAO (RO) Nos.205 & 206 of 2016 20 subject to the next succeeding sub-section (sub-section 3) incorporated in the Kerala Act, wherein it was held that the section enables the defendant to raise a contention as to the proper court fee payable on a plaint and to assist the court in arriving at a just decision on that question and when the defendant raises such question of improper valuation or insufficiency of court fee and fails, he cannot be characterised as an aggrieved person, who can take up in revision the order thereon repelling the contention. But an exception was carved out subsequently in Shamsheer Singh v. Rajinder Prashad (AIR 1973 SC 2384) that the said proposition would apply unless the question of court fee involves also the question of jurisdiction of the court, based on the decision rendered by this court in Vasu v. Chakki Mani (AIR 1962 Ker 84). Hence there cannot be any revision on the question of court fee where no question of jurisdiction was involved.

12. Further, the question of undervaluation of

suit or deficiency of court fee payable is not a FAO (RO) Nos.205 & 206 of 2016 21 matter of dispute inter se between the parties or their entitlement thereof, but the defendant will have the right to object and defend the suit only when it was properly instituted with the liability of payment of court fee. The very same legal position has been precisely settled by the Full Bench of this Court in We-Build's case (supra) and the relevant portion is extracted below for reference:

The question of sufficiency of the Court- fee is neither a proposition of law or fact which a defendant must allege in order to constitute his defence. Therefore, that question is not a material proposition of fact or of law upon which the parties can be said to be at variance, though they may be at variance on that question. O. XX Rule 5 speaks of issues framed under O. XIV R. 1 of the Code, and not of the question of the court fee raised by the defendant pursuant to the enabling provision in

the Court-fees Act in that behalf in order to assist the court in determining the sufficiency or otherwise of the court-fee paid. Even assuming that such a question is an issue framed under O. XIV Rule 1(5), in view of the provision in Sec. 12(2) of the Court-fees Act read with O. VII R. 11(b) and (c), it is an issue the finding whereon, may in some case, if the same is against the plaintiff result in the rejection of the suit. Under O. XIV R. 5 the court may at any time before passing a decree strike out any issue that may appear to it to be wrongly framed or introduced. An issue, the finding whereon will not be helpful to decide the suit one way or the other, is an unnecessary issue and therefore under O. XIV, R. 5 it can be deleted. Shortly put, the determination of the question of court-fees is

FAO (RO) Nos.205 & 206 of 2016 22 called for not because such determination is necessary to decide the suit, but to ensure that revenue is collected for the benefit of the State and the Court-fees Act obliges the court to see to such collection and enables the defendant to assist the court in that function.

13. Necessarily, the defendant must have some

right of hearing in the matter of undervaluation of the suit or deficit court fee, but the right to object the same is to assist the court in arriving at a conclusion regarding proper valuation and court fee payable. Once it was accepted and adjudicated by the trial court, the same cannot be the basis for setting aside the decree and judgment of the trial court unless the said question involves the question of pecuniary jurisdiction or a bona fide omission to value the relief or the property as discussed above. In short, in an appeal based on the decree passed determining the issues involved in the suit, the appellate court cannot go into the question of correctness of the court fee paid or the valuation made in the suit, unless the same constitutes any of the two grounds made mentioned above. FAO (RO) Nos.205 & 206 of 2016 23

14. In the instant case, an order of remand was

passed for the purpose of adjudicating the insufficiency of court fee and undervaluation of suit based on the amendment. The relief of declaration

incorporated by way of amendment and the consequential reliefs were not valued and no statement was incorporated and no court fee was paid at the court of first instance. It was noticed at the first appellate stage. Necessarily, the first appellate court would stand governed by Section 12 of the Kerala Court Fees and Suits Valuation Act, 1959 and also by Rule 23 to 25 of Order XLI C.P.C. and hence bound to address and adjudicate the issue and the court fee payable, for which there cannot be an order of remand. Hence, the

order of remand will stand set aside. The parties

shall appear before the first appellate court on Both the appeals are allowed accordingly. Sd/- P.SOMARAJAN sv JUDGE

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