

Chappila and ors. Vs. Chemmaran and ors.

Chappila and ors. Vs. Chemmaran and ors.

SooperKanoon Citation : sooperkanoon.com/720455

Court : Kerala

Decided On : Feb-08-1960

Reported in : AIR1961Ker200

Judge : P.T. Raman Nayar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 and 151

Appeal No. : C.R.P. No. 55 of 1956 (M) from the order of Dist. Court, North Malabar in A.S. No. 437 of 1954

Appellant : Chappila and ors.

Respondent : Chemmaran and ors.

Advocate for Def. : V.P. Gopalan Nambiar, Adv.

Advocate for Pet/Ap. : A. Achuthan Nambiar, Adv.

Disposition : Petition allowed

Judgement :

ORDER

P.T. Raman Nayar, J.

1. This revision petition arises out of a suit, for partition in which, the present petitioners, defendants 27 to 35, joined the plaintiff in asserting that the properties

in the suit were joint family properties as against the claim of the legal representatives of the 1st defendant -- the 1st defendant died pending suit --' that they were the separate properties of the 1st defendant. The trial court found that some of the properties were joint family properties and the rest the separate property of the 1st defendant. It passed a preliminary decree accordingly, and against that decree the plaintiff appealed while the legal representatives of the 1st defendant filed a memorandum of cross-objections.

While the appeal was pending, the plaintiff decided not to prosecute it and he filed I. A. 217 of 1955 for leave to withdraw it. (Why he thought leave necessary is not apparent). Thereupon the present petitioners, who were respondents 26 to 34 in the appeal, filed I, A, 218 of 1955 praying that they be transposed as appellants and allowed to prosecute the appeal, and, naturally enough, they alleged that the plaintiff was in collusion with the legal representatives of the 1st defendant.

This application by the petitioners was dismissed by the appellate court on 9-8-1955, and the present revision petition is against that dismissal. But on the 21st December 1955, about a fortnight before the revision petition was actually taken on file, the appellate court had disposed of the appeal dismissing it as not pressed; the memorandum of cross-objections it dismissed on merits.

2. In view of the decision in *Anandan v. Gopalan*, ILR 1959 Kerala 862 it is not disputed that the appellate court was wrong in disallowing the transposition sought by the present petitioners so as to enable them to prosecute the appeal which was being abandoned by the plaintiff. What is argued is that since the appeal has been disposed of, the present petition has become infructuous. Even if the petition be allowed, there is now no appeal pending to be prosecuted by the petitioners after transposition, as appellants. The proper remedy of the petitioners was to have come up in second appeal and, even now, they can do so pleading the pendency of the present petition as an excuse for the delay.

3. I am not persuaded by this argument, and I see no occasion for tendering the petitioners the gratuitous advice that they may file a second appeal and take the chance of such an appeal being competent and of the delay being excused. I do not think that the law is so helpless as to be unable to prevent the miscarriage of

justice which the wrong order of the appellate court will doubtless occasion.

It may now be regarded as settled law -- Calcutta alone so far as I can discover striking a discordant note, and even that not consistently -- that the passing of a final decree, or the disposal of a suit after the remand, does not render infructuous an appeal or revision against the order of remand or the preliminary decree as the case may be. If the order of remand or the preliminary decree is vacated, the proceedings pursuant thereto must be regarded as non-existent, and the decree passed in those proceedings automatically goes.

If I may say so with respect there is a very illuminating and analytical discussion of this question in *Kanakayya v. Lakshmayya*, AIR 1951 Mad 218, I appreciate that there is some difference between a case of that nature and the present case in that the proceeding subsequent to the wrong order now sought to be vacated is not a creature of that order so as to be necessarily incapable of an independent existence. Even so I should think that the actual disposal of the appeal in the particular manner in which it was disposed of, was completely dependent on the wrong order since, but for the refusal to transpose the present petitioners as appellants, the appellate court could not have dismissed the appeal in toto as not pressed.

The dismissal is therefore a direct consequence of that wrong order. That is a matter of certainty --not one of a mere possibility that, had the right order been passed, the result might have been different. Therefore, in my view the result of allowing the present petition and transposing the petitioners as appellants would be that the appeal will remain disposed of only so far as the 1st appellant-plaintiff is concerned, and that it must be regarded as pending so far as the remaining appellants, namely the present petitioners, are concerned.

One way of putting the matter is that the present dismissal relates only to the plaintiff, not to the remaining persons now figuring as appellants; another, that if the present dismissal is a dismissal in toto so much of the dismissal as relates to the newly transposed appellants ipso facto ceases to have any force. And, if this view is correct the present petition is by no means infructuous.

4. The position here is analogous to that considered in *Sundaram Chettiar v. Valli Ammal*, AIR 1935 Mad 43. There an appeal against an order refusing leave to defend in a summary suit was allowed notwithstanding that the suit had been decreed and no appeal had been filed against that decree. It was taken for granted that the effect of allowing the appeal and giving the defendant leave to defend, would be to restore the suit to be disposed of afresh.

In considering whether, in such an appeal, stay could be granted of the execution of the decree, the learned Chief Justice who delivered the judgment of the Bench, took the view, though not without hesitation, that, when an order is set aside in appeal or revision, a decree consequential on the wrong order and depending on it for its validity, automatically goes. His Lordship thought that in such cases, where a wrong order has resulted in a wrong decree, the same effect must be given to the setting aside of the wrong order as to the setting aside of a preliminary decree.

In the present case, the dismissal of the appeal as not pressed was a direct consequence of the wrong order declining to transpose the petitioners as appellants, and it depends for its validity on that wrong order. Fortified by this Madras decision, I hold with rather less hesitation than the learned Chief Justice did in that case, that with this petition being allowed and the petitioners being transposed as appellants, the dismissal of the appeal ceases to be of force as against them, and that the appeal must be deemed to be pending and must be heard and disposed of in accordance with law so far as they are concerned.

5. In the result I allow the petition and direct that the petitioners be transposed as appellants, and that their appeal be heard and disposed of in accordance with law. I make no order as to costs.