

Kurien E. Kalathil Vs. Thomas

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Court : Kerala

Decided On : Jun-07-2004

Reported in : 2004(3)KLT1118

Judge : R. Bhaskaran, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 38, Rule 9

Appeal No. : E.P. (C) No. 35938/03

Appellant : Kurien E. Kalathil

Respondent : Thomas

Advocate for Def. : Bechu Kurian Thomas,; N. Manoj Kumar and; E. Subramani

Advocate for Pet/Ap. : C.E. Unnikrishnan, Adv.

Judgement :

R. Bhaskaran, J.

1. This Writ Petition is filed challenging Exts. P2 and P4. orders passed by the Sub Court, Nedumangad. The petitioner in the Writ Petition was the 7th defendant in O.S. 79/2002. The suit was filed for realisation of balance unpaid purchase money in a sale transaction. The petitioner is a subsequent assignee from the original assignee. The original plaintiff filed the suit as indigent person. After his death the

first respondent has been impleaded as additional plaintiff and he was also allowed to continue the suit as indigent person, Subsequently the present petitioner filed an application under Order XXXVIII, Rule 9 of the C.P.C. to withdraw the permission granted to the plaintiff to file the suit as indigent person. That application has been dismissed by the impugned order in this Writ Petition. The reason stated is that the petition is highly belated and the suit is already listed for evidence.

2. According to the learned Counsel for the petitioner the Trial Court has not considered any of the contentions of the parties and the order is not a speaking order and therefore it has to be set aside and the Court is to be directed to pass proper order.

3. Learned Counsel for the contesting respondents on the other hand contended that the attempt of the petitioner is only to delay the passing of decree in the suit which was filed as early as in 2002.

4. After hearing learned Counsel on both sides I do not find any ground to set aside the order passed by the Sub Court. It is to be noted that the original plaintiff filed application for permission to file the suit as indigent person and before adjudication the original plaintiff died and additional plaintiff was impleaded. He also filed application for permission to continue the suit as indigent person. He has given the details of his assets. The present petitioner did not contest that application. After inquiry the same was allowed. Now the petitioner filed petition under Order XXXVIII, Rule 9 C.P.C. Order XXXVIII, Rule 9 contemplates three situations to enable the defendant to approach the Court to disprove the original plaintiff. They are cases where:

(a) If the plaintiff was guilty of vexatious or improper conduct in the course of the suit;

(b) If it appears that his means are such that he ought not to continue to sue as an indigent person; or

(c) If he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

5. According to the learned Counsel for the petitioner, the second Clause will apply to the facts of this case. But that Clause will apply only in a case where the plaintiff has come by fresh means to enable him to pay court fee and it is not a case where it enables the Court to review the earlier order which was passed after considering the case on merit. That is clear from the words 'he ought not to continue to sue as indigent person'. In the petition filed by the additional second plaintiff he has given the details of his assets. According to learned Counsel for the petitioner the second plaintiff has not shown the details of the immovable properties obtained by him. In the counter-affidavit it is controverted stating that these properties were shown in the schedule of the petition filed by the original plaintiff and those properties were already under attachment. No fresh asset has been shown as obtained by the additional plaintiff. Therefore, it is not a case where the additional plaintiff has come by any fresh means so as to enable the Court not to allow him to continue the suit as indigent person.

6. Learned Counsel for the petitioner brought to my notice the decision of the Supreme Court reported in *M.L. Sethi v. R.R. Kapur*, AIR 1972 SC 2379. In that case the Supreme Court has held that while considering the question whether the plaintiff should be allowed to sue as an indigent person or not the defendant has locus standi to contest the application and show that application deserves dismissal. That decision has no application in the present case. He also relied on the decision of this Court reported in *Mathew v. State of Kerala* 1996(2) KLT 303: It is stated in that case that when an applicant does not disclose an asset held by him in his application, the application is liable to be rejected. Here there is no complaint that any particular asset was not disclosed and therefore the petition is liable to be rejected.

7. Learned Counsel for the respondents on the other hand brought to my notice, the decision of the Andhra Pradesh High Court reported in *In re Ashfar Ahmed*, AIR 1984 A.P.247, where similar question arose. It was held by the Andhra Pradesh High Court that Order XXXVIII, Rule 9 C.P.C. cannot be invoked to

review an earlier order passed allowing the plaintiff to file the suit as indigent person. There is no complaint of non disclosure in the application for impleading or in the application filed by the original plaintiff. In the absence of any complaint of the additional plaintiff obtaining any property subsequent to the passing of the order the petition filed under Order XXXVIII, Rule 9 can only be dismissed. It is more so in this case wherein the evidence has started and the trial is in mid way. If such petitions are entertained the trial will get prolonged which may be to the advantage of the defendant from whom large amounts are alleged to be due to the plaintiff. The Writ Petition is without any merit. The Trial Court shall dispose of the suit without further delay.

The Writ Petition is disposed of as above.

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