Thomas Vs. Thomas

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Court : Kerala

Decided On : Oct-16-2006

Reported in : 2005(1)ALD(Cri)35; 2006(4)KLT739

Judge : M. Sasidharan Nambiar, J.

Acts : Code of Civil Procedure (CPC) - Sections 35, 35(1), 35(2) and 35(3) - Order 41, Rule 35; Constitution of India - Article 227

Appeal No. : W.P.(C) No. 21470 of 2006

Appellant : Thomas

Respondent : Thomas

Advocate for Def. : N.M. Mohammed Ayub, Adv.

Advocate for Pet/Ap. : S.V. Balakrishna Iyer,; K. Jayakumar and; P.B. Krishnan

Judgement :

M. Sasidharan Nambiar, J.

1. The trial court decreed the suit with cost. It was challenged in the appeal by defendant. The appeal was allowed in part modifying the decree. The judgment of the appellate Court did not provide for cost either of the appellate court or trial court. The question is whether the plaintiff is entitled to the proportionate cost for

the confirmed portion of the decree as granted by the trial Court, whether there is merger of the trial court decree regarding the cost with the appellate decree and if riot whether the decree holder is entitled to realise the proportionate cost awarded by the trial court.

2. Petitioner is the decree holder. He instituted the suit seeking a decree for realisation of Rs. 4,54,510/- with interest and cost. Suit was decreed on 10.4.02. Under Ext.Pl decree petitioner was allowed to realise it with interest at 6% on 2,26,011/-from 26.4.99 till realisation and costs of the suit. Respondent judgment debtor challenged the appeal in A.S.375/02 before this court. A Division Bench of this Court under Ext.P2 judgment modified the decree. Ext.Pl decree was modified as follows:

In the result, the judgment and decree of the court below are modified and a decree is given to the plaintiff for an amount of Rs. 1,58,011/- with interest thereon at 12% per annum from 26.4.1999 till date of recovery.

The appeal is disposed of as above.

Whether the post awarded by the trial court was justified or to be set aside was not considered in Ext.P2 judgment. It was also not found that plaintiff is not entitled to the cost. True, Ext.P2 does not provide for payment of any cost either that of the appeal or the suit. Ext.P3 execution petition was filed for realisation of Ext.Pl decree as modified by Ext.P2. In Ext.P3 petitioner claimed the cost as awarded by the trial court. Respondent filed Ext.P4 objection contending that as judgment of this Court in appeal do not provide for cost, petitioner is not entitled to claim cost in the E.P. Under Ext.P5 order, executing court held that as the appellate decree do not provide for costs, decree holder is not entitled to the cost awarded by the trial court. It is challenged in this petition filed under Article 227 of Constitution of India.

3. Adv. Sri. S.V.Balakrishna Iyer, learned Counsel appearing for the petitioner relying on the decisions of Supreme Court in State of Madras v. Madurai Mills Co. Ltd AIR 1987 SC 681 and a learned single Judge of High Court of Orissa in Dambarudhar Bhunya v. Muralidhar Bhunya : AIR1986 Ori15 argued that there is no merger of the cost part of the decree of the trial court with the decree of the

appellate Court and as the cost awarded by the trial court was not set aside, varied or modified by the appellate Court, decree holder is entitled to the proportionate cost of the decree as confirmed in appeal and therefore Ext.P5 order is to be set aside. Learned Counsel appearing for respondent relying on the Full Bench decision of this Court in Kannan v. Narayani 1980 KLT 9 and Division Bench decision in Saheeda v. Hamelatha 2002 (3) KLT 301 and that of the Apex Court in Kunhayammed v. State of Kerala : [2000]245ITR360(SC) argued that as Ext.P2 decree was challenged in appeal and the decree was modified by the appellate Court, the decree of the trial court merged with the decree of the Appellate Court and therefore the only executable decree is that of the appellate Court and as the appellate Court decree did not-provide for any cost, executing court rightly held that petitioner is not entitled to claim the cost awarded by the trial court and the petition is not maintainable.

4. Section 35 of Code of Civil Procedure deals with costs. Under Sub-section (1) subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court. The court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid and to give all necessary directions for the aforesaid purpose. Under Sub-section (2) where the court directs that costs shall not follow the event, the court shall state its reasons for the decision in writing. Therefore when Sub-section (1) of Section 35 mandates that costs of the suit shall be in the discretion of the court, Sub-section (2) mandates that if cost is not awarded court shall state its reasons in writing. Order 41 Rule 35 provides the decree in appeal. Sub-section (3) of Rule 35 reads:

The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

Therefore under Sub-section (3) of Rule 35 of Order 41 decree of the appellate Court shall state not only the amount of costs incurred in the appeal and by whom or out of what property and in what proportion such cost is to be paid but shall also state the costs in the suit are to be paid. Ext.Pl decree of the trial court provides for

payment of costs by the defendant to the plaintiff. Ext.P2 judgment does not provide for any costs, either cost in the appeal or cost in the suit. The appellate Court did not consider whether the cost awarded by the trial court is erroneous. There is also no finding that plaintiff who succeeded at the trial court is not entitled to the costs or that trial court should not have awarded the cost. When the trial court found that the total amount due was Rs. 4,50,000/- appellate Court found that the oral loan of Rs. 68,000/- was not proved and the consideration proved was only Rs. 1,73,011/- out of which Rs. 15,000/-was paid and only Rs. 1,58,011/- was payable. The decree was modified to that extent. When the trial court granted an interest of only 6% on the principal amount, appellate Court granted interest at 12% on the entire amount decreed from the date of the suit. Ext.P2 therefore shows that the appellate Court did not find that the decree holder is not entitled to the costs awarded by the trial court. As the appellate decree and judgment do not provide for costs, it cannot be disputed that decree holder is not entitled to the costs in the appeal. But the question is whether the proportionate cost for portion of the decree confirmed by the trial court is enforcible.

5. A similar question was considered by a learned single Judge of Orissa High Court in Dambarudhar Bhunya's case (AIR 1986 Ori. 15)(supra). In that case suit was decreed by the trial court with costs. It was challenged in appeal. The appeal was allowed in part and parties were directed to bear the respective costs. The decree holder claimed the cost awarded by the trial court. It was disputed by the judgment debtor. Following the decision of the Apex Court in State of Madras v. Madurai Mills Co. Ltd. : [1967]1SCR732 where it was held that the application of the doctrine of merger depends on the nature of the appeal or revision order in each case, it was held that doctrine of merger is not applicable in the matter of realisation of costs awarded in a suit or appeal. The learned single Judge held:

the 'Doctrine of Merger' is not applicable in the matter of realisation of costs awarded in a suit or appeal. On the other hand, for realisation of costs, the specific order of the Courts passed in exercise of their discretion conferred by Section 35 of the Civil P.C shall be the guiding factor. If the Court of appeal passes an order that the parties shall bear their respective or own costs, such a direction is confined to the costs of the appeal alone. If on the other hand, the direction is to

the effect that the parties shall bear their respective or own costs throughout, the parties shall bear their respective costs both in the Court of appeal, as well as, in the trial court. If, in appeal a direction is given to the effect that any one of the parties shall bear the costs of the appeal or suit, such party shall bear the costs accordingly. In the aforesaid view of the matter and having regard to the discretion exercised by this Court in First Appeal No. 177 of 1971 awarding costs, the learned Subordinate Judge arrived at the correct conclusion in holding that opposite party No.l was entitled to realise the costs of the suit.

In Madurai Mills (supra) case the Company submitted return before the Commercial Tax Officer showing Rs. 15,27,61,888.84 who in turn determined the net turnover at Rs. 15,44,09,109.3.11. Madurai Mills contended that a sum of Rs. 1,44,294.14.4 was wrongly included by the first assessing authority. It was also contended that Rs. 81,546.01 being the sale proceeds realised by selling empty drums was not realisation in the course of his business. The said objection raised in the appeal was considered by the Commercial Tax Officer. He upheld the first contention but rejected the second contention with regard to Rs. 81,546.01. Thereafter Deputy Commercial Tax Officer issued a revised assessment. The Company presented a revision petition before the Deputy Commissioner of Commercial Taxes. The only objection was that it should, not have been assessed on amounts collected by way of tax. No objection regarding the order of assessment of the Deputy Commercial Tax Officer was raised. The revision was dismissed holding that the Company is not entitled to raise the contention for the first time and even otherwise the Madras General Salestax permitted the inclusion of that tax in the taxable turnover. The Board of Revenue thereafter issued a notice to the Company proposing to revise the assessment of the Deputy Commercial Tax Officer by including the net turnover a sum of Rs. 7,74,62,706-1 - 6. As that amount was wrongly excluded by the Assessing Authority, the Company objected the same in the revision contending that it was barred by limitation and there was no wrong exclusion. The Board of Revenue overruled the objections and fixed the net taxable turnover. Company filed an appeal to the High Court of Madras. The High Court allowed the appeal holding that the Board of Revenue cannot invoke its revisional jurisdiction after the expiry of the limitation period. Apex Court found that the objection taken by the Board of Revenue with regard to

the question of exemption allowed on the value of cotton purchased from outside the State and the exemption was allowed by the Deputy Commercial Tax Officer in his order of assessment. It was found that the only point raised before the Deputy Commissioner of Commercial Tax was with regard to the inclusion of the amount of tax to the extent of Rs. 6,57,971-4-9. It was also found that the subject matter of the revision proceedings before the Board of Revenue was the revised assessment order dated 28.11.1952 and the order of the Board of Revenue was beyond the period of limitation provided under Section 12(4)(b) of the Act and hence invalid. A contention was raised that a statutory appeal was provided and on the disposal of the appeal there was merger of the order of the Tribunal with the Appellate order and thereafter only the appellate order is effective and can be enforced. The doctrine of merger was considered in that context. The Apex Court held:

But the doctrine of merger is not a doctrine of rigid and universal application and it cannot be said that wherever there are two orders, one by the inferior Tribunal and the other by a superior Tribunal, passed in an appeal or revision, there is a fusion or merger of two orders irrespective of the subject matter of the appellate or revisional order and the scope of the appeal or revision contemplated by the particular statute. In our opinion, the application of the doctrine depends on the nature of the appellate or revisional order in each case and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

The doctrine of merger was considered by a three Judge Bench of the Supreme Court in Kunhayammed v. State of : [2000]245ITR360(SC) . It was held as follows:

The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way -whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court,

tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid shall have to be kept in view.

The meaning of the word 'to merge' as provided in (Corpus Juris Secundam) was quoted as follows:

To merge' means to sink or disappear in something else to become absorbed or extinguished to be combined or be swallowed up. Merger in law is defined as the absorption of a thing of lesser importance by a greater, whereby the lesser ceased to exist, but the greater is not increased, an absorption or swallowing up so as to invoke the loss of identity and individuality.

The principles have been finally laid down as follows:

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses, or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) xxx xxx xxx(iii) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it.

Full Bench of this Court in Kannan v. Narayani 1980 KLT 9 and in Saheeda v. Hamelatha 2002 (3) KLT 301 also followed the principle that the judgment and decree of the trial court merged with the decree and judgment of the appellate court on the disposal of the appeal.

6. But the question is when the trial court exercising the discretion awards costs of the suit as provided under Section 35 of the Code and in the appeal appellate Court did not reverse, vary or modify the direction passed by the trial court to pay cost to the plaintiff and did not direct the parties to bear the costs, whether it could be said that the portion of the decree regarding cost payable has merged with the appellate decree and thereafter cannot be executed. The principle that when the trial court decree is challenged in an appeal and the appellate Court disposes the appeal either by reversing the decree or by confirming the decree or by modifying the decree of the trial court thereafter the executable decree is that of the appellate Court decree, cannot be challenged. But can it be said that the trial court decree regarding cost, which was not considered or reversed or varied or modified by the appellate court, has merged with the trial court decree and thereafter that part of the decree which was not set aside, varied or modified is not executable. It cannot be disputed that appellate Court is competent to consider the correctness of the discretion exercised by the trial court in awarding cost under Section 35 of the Code along with the correctness of the findings on other issues answered by the trial court and challenged in the appeal. The appellate Court is competent to set aside, vary, or modify or confirm the said discretion exercised by the trial court. It is competent to allow or disallow the cost either awarded or not awarded by the trial court. Sub-rule (2) of Rule 35 of Order 41 mandates that the decree of the appellate Court shall state not only the cost payable in the appeal but also the cost in the suit. But when the discretion exercised by the trial court was not at all considered in the appeal, can it be said that, that portion of the decree regarding costs merged with the appellate Court decree and therefore the cost awarded by the trial court or the proportionate cost to which the plaintiff otherwise is entitled to, is not executable. Take the case of an appeal filed by the defendant challenging the decree granted by the trial court whereunder plaintiff was granted the decree for realisation of the amount claimed in the plaint with cost. The appeal was dismissed. There is no direction in judgment of the appellate court regarding cost. In that case can it be said that the plaintiff who succeeded not only before the trial court, but also before the appellate Court is not entitled to the cost awarded by the trial court for the sole reason that the appellate Court did not say anything on cost either of the Appellate Court or the trial court in its judgment? can it be said that

because of the merger of the trial court decree in the decree of the appellate Court, plaintiff is not entitled to the cost awarded by the trial court?. Take another case, where such an appeal was dismissed and appellate court directed parties to bear their respective cost in the appeal and the decree or judgment of the appellate court is silent on the cost of the suit at the trial court. Can it be said that the plaintiff who succeeded not only before the trial court but also before the appellate court, is not entitled to the cost awarded by the trial court for the reason that the appellate Court though dismissed the appeal did not deal with the trial court cost. That exactly is the position herein. The appellate Court confirmed part of the decree awarded by the trial court. Appellate Court did not find that plaintiff is not entitled to the proportionate cost for that part of the decree confirmed by the appellate Court. It was also not found that plaintiff is not entitled to any cost either in the appeal or in the suit. In such a case, plaintiff cannot be denied the proportionate cost awarded by the trial court by the application of doctrine of merger. It is more so, because the doctrine of merger is not a doctrine of universal or unlimited application. As far as the cost portion of the decree is concerned as the appellate Court did not consider the question at all, there is no decision by the appellate Court on the correctness of cost awarded by the trial court. Appellate Court did not find that the discretion exercised by the trial court in awarding cost is not correct. Appellate Court also did not exercise the discretion vested in it and found that plaintiff is not entitled even the proportionate cost awarded by the trial court. If that be so, there is no decree by the appellate Court regarding the costs. Therefore there is no merger of the trial Court decree regarding cost in the appellate decree, as the question of cost was not considered or provided in the decree. If that be so, the decree of the trial court regarding cost was not merged with the appellate decree and the plaintiff is entitled to the proportionate cost for the part of the decree confirmed by the appellate court. That view is supported by the view taken by High Court of Patna.

7. A single Judge of the High court of Patna in Babu Lal v. Ganpat Lal : AIR1958 Pat506 considered a similar question. It was a suit for specific performance of the contract. The suit was decreed with cost against all defendants. Third defendant filed an appeal. It was dismissed with cost by the Division Bench. The High Court decree mentioned the amount of cost payable by the appellant to the plaintiff. The

decree did not mention the amount of cost which had been awarded by the first court and whose decision has been affirmed by the High Court. The appellate decree only mentioned that the appeal is dismissed with costs. When the decree was put to execution, it was contended that as the cost of the trial court is not shown in the appellate decree, plaintiff is not entitled for the same. The question considered by the leaned single Judge was whether the trial court decree merged into the appellate court decree and became a part and parcel of the same and whether the decree holder is entitled to realise the cost of the first Court eventhough the decree does not specifically mention the cost awarded by the first Court. The learned single Judge found that in view of Rule 35(3) the cost in the suit which are to be paid have also to be mentioned in the decree of the appellate Court and the High court decree had been wrongly prepared. It was then held:

I hold that the executing court has not exceeded its jurisdiction in referring to the decree of the first Court, which was on the record, and which had been filed by the decree holders in finding out what the amount of the cost awarded was. On this ground, I am not inclined to interfere with the order of the Court below.

A similar case was considered by Rigg, J. In Lall Dwarkadas v. Burma Railways Company AIR 1920 Lower Burma 118. In that case the suit was decreed with cost. The appeal was dismissed. Nothing whatever has been said about the cost. Considering the question whether plaintiff is entitled to the cost in execution, it was held:

Nothing whatever has been said about costs in the lower court and that portion of the lower Court's decree has neither been dissented from nor confirmed nor considered. In these circumstances if the Burma Railways want to inquire what orders were passed as to costs in the lower Court, it appears to me to be only one decree that they could possibly consider and that is the decree in the lower Court. And that decree, so far as it relates to costs, still remains the only order which any Court has yet passed on the subject of costs.

It was finally held:

As I have already said, in the present case, this is not a decree that the Burma Railways could execute relating to their costs except the original decree and for that reason there is no question of the appellate Court's decree superseding it.

8. The Division Bench of this Court while disposing the appeal preferred against Ext.Pl decree, did not find that plaintiff is not entitled to the cost at all. In the appeal part of the decree was confirmed and nothing whatsoever was stated about the cost payable. In such circumstances, it can only be found that the cost portion of the Ext.Pl decree was not varied or modified by the appellate court and therefore the decree holder is entitled to the proportionate cost awarded by the trial court. The position would have been different if the appellate court had found that plaintiff is not entitled to the cost or atleast directed the parties to suffer their costs. As that is not the case herein, the decree holder is entitled to the proportionate cost for the portion of the decree confirmed by the appellate court. The executing court is competent to refer the decree of the trial court for fixing the proportionate cost, eventhough appellate decree does not provide for payment of cost. Ext.P5 order is therefore quashed. Court below is directed to execute Ext.Pl decree to the limited extent of cost for the proportionate amount confirmed in the appellate decree.

Writ Petition is disposed of as above.