

Brijitha and Others Vs. Kuttiyamma

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Court : Kerala

Decided On : Jan-24-2012

Judge : Thomas P. Joseph

Appeal No. : RSA.No. 148 of 2012

Appellant : Brijitha and Others

Respondent : Kuttiyamma

Judgement :

THOMAS P. JOSEPH, J.

1. The scope of enquiry by the appellate court in an appeal arising from a judgment and decree passed ex parte is raised for a decision in this Second Appeal.

2. Respondent sued the appellants, her mother and brother for partition and separate possession of the share claimed by her in the suit property which originally belonged to the late Joseph, her father. Appellants resisted the suit and raised a counter claim contending that respondent was sent in marriage giving her share in the family property and thereafter, appellants effected partition of the suit property as per document No. 2669 of 2006. The prayer in the counter claim is for a declaration that the said partition deed is valid and for other reliefs. The case came up for trial on 23.10.2009. That day, appellants and counsel remained absent. Appellants were set ex parte. Respondent produced Exts. A1 to A3 and on the strength of those documents and the affidavit filed by her, a preliminary decree for

partition was passed. The counter claim was dismissed. Appellants filed I.A.Nos.1189 and 1190 of 2009 to set aside the ex parte decree and to condone the delay in filing the application. Those applications were dismissed. Appellants challenged the ex parte judgment and decree in the Sub Court, Pala in A.S.No.88 of 2010. There, appellants prayed for a remand of the case explaining the circumstances under which they happened to be absent in the trial court on the day of trial. Learned Sub Judge dismissed the appeal. Hence this Second Appeal urging by way of substantial questions of law whether in an appeal filed against the ex parte decree, is it not in the interest of justice that as per Order XLI, Rule 23 of the Code of Civil Procedure (for short, "the Code"), the case is remanded to give the appellants an opportunity to substantiate their contentions and whether, it is legally justifiable that since the petition to set aside the ex parte decree is dismissed by the trial court, the prayer for remand cannot be allowed?

3. It is contended by the learned counsel that appellants had justifiable reason for their absence in the trial court on the day of trial which the first appellate court has not taken into account. It is also contended by the learned counsel that there is nothing which prevented the first appellate court from remanding the case to the trial court for fresh decision after giving appellants opportunity to adduce evidence.

4. It is not disputed that on account of absence of appellants and counsel trial court decided to hear the suit ex parte. Acting upon the evidence let in by the respondent, a decree for partition was passed in her favour. The counter claim was dismissed.

5. The question is whether in an appeal arising from the judgment and decree passed ex parte, it is open to the appellate court to consider whether appellants were prevented by sufficient cause from appearing in the trial court when the suit was called on for hearing.

6. This Court, referring to the decisions of other High Courts held in *Bava@ Asees v. Madhavan and Others* (1995 (2) KLJ 706) that a party is not entitled to ask the appellate court to accept the appeal (filed under Sec.96(2) of the Code) on a ground which he could urge in an application under Rule 13 of Order IX of the Code and request for a remand of the case for re-hearing. That decision was referred to and relied on by a Division Bench in *Abdul Azeez v. Shareefa Beevi*

(1997 (1) KLT 8). In an appeal arising from an ex parte order of eviction passed under Act 2 of 1965, the Division Bench held that in an appeal filed against the order of eviction whether ex parte or on merit, appellant can succeed only on merit establishing that the order of eviction is illegal on the materials available on record and not for the reason that he was denied the opportunity to contest the petition for eviction.

7. A later Division Bench, in *Ajith Mathews v. Sheelamma Thomas* (2011 (2) KLT 225) though without reference to the decision of the Division Bench referred supra, did not approve the view taken in *Bava @ Asees v. Madhavan and Others*. The Division Bench expressed its view as under:

"In an appeal under Section 96(2) of the Code the decree can be challenged on all available grounds including the one pertaining to the circumstances which led to passing of the ex parte decree. The appellate court can consider not only the merit of the case, but also the circumstances which warranted passing of the final decree.".

That decision was rendered relying on the decision of the Supreme Court in *Bhanu Kumar v. Archana Kumar* (2005 (1) KLT 456). There, the Supreme Court observed:

"The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the Trial Court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against S.96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable."

8. The decision in *Ajith Mathews v. Sheelamma Thomas* cannot be understood as laying down the law that in an appeal under Sec.96(2) of the Code against a judgment and decree passed ex parte it is open to the appellant to canvass grounds which he could urge in an application filed under Rule 13 of Order IX of the Code.

In an appeal preferred under Sec.96(2) of the Code it may be open to the appellant to challenge legality of the order setting him *ex parte* and passing an *ex parte* decree. The position can be illustrated thus: in a suit for recovery of money based on a demand promissory note the defendant admitted execution of the negotiable instrument but denied passing of consideration or, raised a plea of discharge. The onus of proof was on the defendant. In such a case if the defendant was absent, the trial court would be justified in granting a judgment and decree in favour of the plaintiff. In that case, in an appeal against the *ex parte* judgment and decree the appellant cannot contend that he was prevented by sufficient cause from not appearing in the trial court. That is a plea which the appellant-defendant may urge in an application made under Rule 13 of Order IX of the Code. If on the other hand defendant had denied execution of the instrument and passing of consideration, burden of proving due execution of the instrument was on the plaintiff. In that case if on the day the case is posted for trial defendant is absent but, his counsel is present with preparedness to take part in the trial and cross examine plaintiff and his witness if any but, in spite of that, the trial court taking note of absence of the defendant declares him *ex parte* and that is followed by an *ex parte* judgment and decree in favour of the plaintiff, when the defendant challenges that judgment and decree in appeal under Sec.96(2) of the Code, it is open to him to contend that the trial court went wrong in declaring him *ex parte* and passing the *ex parte* judgment and decree. That is the scope of enquiry the appellate court can have in the appeal from a judgment and decree passed *ex parte* apart from considering the appeal on its merit. In an appeal preferred under Sec.96(2) of the Code against an *ex parte* judgment and decree, appellate court cannot consider the question whether appellant was prevented by sufficient cause from not appearing in the trial on the day of trial. That is all what the Division Bench also stated in *Ajith Mathews v. Sheelamma Thomas*. I must also notice that though the Division Bench in the said decision did not approve the view taken by the learned Single Judge in *Bava @ Asees v. Madhavan and Others*, the said decision was relied on and approved by another Division Bench in *Abdul Azeez v. Shareefa Beevi* which was not taken note of while deciding *Ajith Mathews v. Sheelamma Thomas*.

9. Coming back to the facts of this case, appellants denied the claim of respondent that she is entitled to partition and separate possession of the property for the

reason that at the time of her marriage she was given her share in the family property. Appellants claimed that later, they partitioned the property as per document No.2669 of 2006. Hence appellants prayed for a decree on the counter claim. Admittedly Joseph died intestate and appellants and respondent are the natural legal heirs. Therefore, respondent was entitled to get a share in the property of her deceased father. In that situation, if at all the plea was tenable it was for the appellants to show that the share of respondent had already been given and hence, partition deed No.2669 of 2006 (to which respondent is not a party) is valid. Burden of proof in that regard was on the appellants. Hence in their absence in the trial court on 23.10.2009 the said court was justified in dismissing the counter claim and granting a decree in favour of respondent. When that judgment and decree though ex parte were challenged before learned Sub Judge, the two questions that could be urged were only whether the trial court was correct in deciding to hear the case ex parte and whether on merits judgment and decree of the trial court could be sustained? As aforesaid, appellants could not urge any of the grounds which they could have raised in an application under Rule 13 of Order IX of the Code. On the facts of this case trial court was correct in deciding to hear the case ex parte, passing a judgment and decree in favour of the respondent and dismissing the counter claim.

10. In the above circumstances, there was no scope for a remand as provided under Rule 23 of Order XLI of the Code. There was nothing which required the first appellate court to remand the case to the trial court in the above circumstances.

11. In the above view, no substantial questions of law as urged arise for a decision in this Second Appeal.

Second Appeal is dismissed.

All pending interlocutory applications will stand dismissed.

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