

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

CRP.No. 319 of 2014 ()

**ORDER IN I.A.NO.1178 OF 2011 IN A.S.NO.25 OF 2010 OF COURT OF SUBORDINATE
JUDGE, PERUMBAVOOR, DATED 12.11.2013.**

REVISION PETITIONER/PETITIONER/APPELLANT:

**GEORGE.P.CHERUKOTH, AGED 58 YEARS,
S/O.POULOSE, CHERUKOTH HOUSE, LAYAM ROAD,
ERNAKULAM VILLAGE, KANAYANNOOR TALUK, PIN: 682 011.**

**BY ADVS.SRI.V.RAJENDRAN (PERUMBAVOOR)
SRI.GEORGE VARGHESE KIZHAKKAMBALAM**

RESPONDENTS/RESPONDENTS/RESPONDENTS:

- 1. MARIYUMMA, W/O.BAPPU, ASARIPARAMBIL HOUSE,
KUTTAMASSERY KARA, THOTTUMUGHAM P.O., ALUVA EAST VILLAGE,
ALUVA TALUK - 683 105.**
- 2. ISAMAIL,, AGED 58 YEARS,
S/O.KUNJUPILLA, CHERAYAKKATTIL KALLELIL HOUSE,
ARACKAPPADY KARA, VENGOLA VILLAGE,
ADDRESS FOR SERVICE: ISAMAIL, AGED 58 YEARS, S/O.KUNJUPILLA,
CHERAYAKKATTIL KALLELIL HOUSE, NORTH EZHIPURAM KARA
VAZHAKKULAM VILLAGE, KUNNATHUNADU TALUK - 683 105.**
- 3. AISHA BEEVI,
W/O.SULAIMAN, ASARIPARAMBIL HOUSE, KUTTAMASSERY KARA,
ALUVA EAST VILLAGE, THOTTUMUGHAM P.O.,
ALUVA TALUK - 683 105**
- 4. AISHA BEEVI, W/O.ISMAIL,
CHERAYIKKATTU HOUSE (KALLELIL), NORTH EZHIPURAM KARA
VAZHAKKULAM VILLAGE, KUNNATHUNADU TALUK - 683 105.**

R1-R4 BY ADV. SRI.S.B.PREMACHANDRA PRABHU

**THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 28-09-
2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

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SUNIL THOMAS, J.

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C.R.P.No. 319 of 2014

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Dated this the 28th day of September, 2015

ORDER

The revision petitioner, who is the plaintiff/appellant in A.S. No.25 of 2010 of Sub Court, Perumbavoor, is aggrieved by dismissal of I.A.No.1178 of 2011, by which he sought review of the judgment and decree of the appellate court.

2. The plaintiff, who was the owner of an item of property, contented that the 1st defendant who was the owner of western property, indiscriminately and unscientifically excavated his property and thereby caused serious threat of loss of lateral support to plaintiff's property from the defendants property. Mandatory and prohibitory injunctions were sought to restore the lateral support and to prohibit the defendant from removing soil from plaintiff 'B' schedule property, without leaving at least 15 ft. width from the boundary. The trial court, refused to grant mandatory injunction, but granted a relief of

prohibitory injunction. It was carried in appeal, at the instance of the plaintiff. The lower appellate court substantially allowed the appeal. This was challenged in second appeal by the defendants which was dismissed at the thresh hold, without notice to the plaintiff. In the meanwhile, the plaintiff had filed I.A.NO.1178 of 2011, seeking a review of the judgment and decree to the extent of incorporating a permission to the plaintiff to carryout and complete the work and to recover the amounts from the defendants, in case they disobeyed the mandatory injunction decree. This was dismissed by the court below, holding that the second appeal filed by the defendant stands disposed of and hence there was no scope for invoking the power of review. The legality and correctness of the above order is impugned in this revision.

3. There is no dispute that the plaintiff had sought for a prayer for a mandatory injunction, to restore the lateral support by constructing a retention wall. The lower appellate court specifically granted this as relief C, in the

following terms.

“C) Defendants 1,3 and 4 are liable to construct a retention wall having a height of about 10 meters on the western boundary in its entire length of plaint A schedule property so as to restore lateral support to plaint A schedule property”.

4. The grievance of Mr. V. Rajendran, the learned counsel for the Revision Petitioner/Plaintiff was that though the lower appellate court allowed the appeal and directed the defendants to restore the lateral support by constructing a supporting wall, the court did not go further to permit the plaintiff to do the work at the cost of defendants, in case of their disobedience and to recover it from them. It was contended that any relief of mandatory injunction without such a default clause would render relief 'C' of the decree nugatory, ineffective and unexecutable, since the entire burden of construction by the plaintiff

would involve huge expenses. It was on this premise that the review was sought. However, the judgment of the lower appellate, a copy of which was made available at the time of hearing show that the court has clearly dealt with this prayer, at para 19 of the judgment as follows:

“ Therefore defendants are liable to construct a retention wall having a height of 10 mts from the lower ground level on the western boundary in the entire length of plaint 'A' schedule property so as to restore the lateral support to plaint A schedule property. If the defendants fail to construct the retention wall as indicated above, plaintiff can get it done and realise the cost of the construction from the defendant.”

(emphasis supplied)

5. Even though the lower appellate court categorically held as above and permitted the plaintiff to recover the costs from the defendants, while paraphrasing the reliefs in the last paragraph of the judgment, the mandatory relief

was referred to, but the latter part of the relief granted was omitted to be carried forward. After paragraph 19 quoted above, court proceeded to refer to the reliefs evolved from the preceding discussion of facts, which eminently shows that the relief granted by the lower appellate court was inadvertently not completely carried forward in the final operative part of the judgment. Nonetheless, there cannot be any doubt that the above relief was specifically granted elsewhere in the judgment.

6. However, the court below, rejected the petition for review on the ground that the RSA filed by the defendants stood disposed of and hence there was no scope for invoking the powers under Order 47 Rule 1 C.P.C. A copy of RSA 1460 of 2011 which was made available at the time of hearing clearly shows that the second appeal was dismissed at the threshold, without notice to the plaintiff. Mr. Premachandra Prabhu, learned counsel for the Respondent/Defendant contended that there was a merger of decree of the lower appellate court with the decree of the

second appellate court and thereby the lower appellate court ceased to have jurisdiction to review the decree.

7. The decisions of the Supreme Court hold the view that when a matter is dismissed at the threshold, without notice to the opposite party, there is no merger of decree. However, in Sree Narayana Dharmasanghom Trust Vs. Swami Prakasananda and Others (1997 (6) SCC 78), it was held that a revisional order of the High Court against which a petition for special leave was dismissed in limine could not have been reviewed by the High Court subsequent to dismissal of SLP by the Supreme Court. In State of Maharashtra and another Vs. Prabhakar Bhikaji Ingle (1996 (3) SCC 463), a two Judges bench of the Hon'ble Supreme Court held that dismissal of special leave petition without a speaking order does not constitute res judicata, but the order dealt with in the SLP cannot be subjected to review by the court/Tribunal, below. However, contrary view regarding the merger was taken in V.M,Salgaocar & Brothers Pvt. Ltd. Vs. Commissioner of Income Tax (2000

(3) Scale 240), and Shankar Ramchandra Abhyankar Vs. Krishnaji Dattatraya Bapat AIR 1970 SC 1. However, all the above decisions were considered by a 3 judges bench of Supreme Court. After analyzing the earlier decisions, the Bench of Supreme Court in Kunhayammed & others V. State of Kerala and another (AIR 2000 SC 2587) held that the doctrine of merger is neither a doctrine of constitutional law nor a doctrine statutorily recognised. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. It was held that 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. 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, which is the final, binding and operative.

8. Applying the above concept in the light of the

disposal of the special Leave Petitions, the Hon'ble Supreme Court held that the effect of non-speaking order or dismissal of a Special Leave Petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where the special leave should be granted. It may be that in spite of having granted leave to appeal, the Court may dismiss the appeal, and then the decision of the Supreme Court would result in superseding the decision of the appeal, attracting doctrine of merger. But, if the reasons had prevailed with the court for refusing leave to appeal, the order would not have been an appellate order, but only an order refusing to grant leave to appeal.

9. Regarding the concept of merger and review, it was held that both concepts are closely interlinked. If the judgment of the High Court has come up to Supreme Court by way of a special leave and the appeal is disposed of with or without reasons, by affirmation or otherwise, the

judgment of the High Court merges with that of the Superior Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this court. Hence the Supreme Court held that where the special Leave Petition is dismissed, there being no merger, the aggrieved party is not deprived of any statutory right of review and if it was available, he can pursue it.

10. Viewed from this angle, in the case at hand, the dismissal of regular second appeal by the High Court without admitting and without notice to other side is akin to refusal of a leave to appeal, and will not result in merger. In the above circumstances, the reasoning of the court below is not sustainable. Further, in this case, there is a subtle distinction. The review was sought by the plaintiff himself who had obtained a decree. A new relief which would have varied or upset the decree already granted was also not sought. Further, the relief sought in the I A in fact, was one which was considered and granted by the lower

appellate court. It formed part of the judgment, which was challenged in the second appeal and was available before the court while considering the regular second appeal, and after consideration of complete facts, had held that the matter did not involve any Substantial Question of law.

11. The next question that arises is whether, the relief sought in the application fell within the scope of Order XLVII Rule 1 CPC. It cannot be said that the relief sought in the application had not been granted. In fact, it was specifically granted as referred above. A relief in relation to a matter in issue, specifically and unambiguously granted after proper discussion of facts, with due and conscious application of mind and forming part of judgment, does not cease to be unexecutable or will not be ineffective, merely because, it is inadvertently not carried forward in its entirety in the operative part of the judgment. Consequently there is no reason as to why, it should not form part of the decree, since the decree is the formal expression of adjudication which, so far as regards the

court expressing it, conclusively determines the rights of the parties, with regard to all or any of the matter in controversy, as defined in Section 2(2) of Code of Civil Procedure. Since the right of the plaintiff to have a mandatory injunction is answered in his favour, with a specific condition to have the above relief performed by the plaintiff, in case of default or failure to perform by the defendant, it also forms part of the executable relief granted. Hence, there is no reason why it should also not form part of decree, since the decree cannot be a mere reproduction of the operative part of the judgment alone. This view is in tune with the spirit of Section 2(2), Section 33 and Order XX Code of Civil Procedure.

12. In this scenario, though a reasonable apprehension of the plaintiff is made out, no ground worth invoking the power for review as contemplated under Order XLVII Rule 1 emerges. The fact that the relief was not specifically mentioned in the operative part of the judgment will not make the remedy granted elsewhere, nonetheless

ineffective, and at the best it can only be considered as inadvertent error or omission of the court and not even one falling within the ambit of Section 152 C.P.C. As mentioned earlier, it will not make the relief ineffective and hence does not call for any amendment of judgment or decree. However, the only possible apprehension of the plaintiff can only be that the relief so granted may not find a place in the decree drafted, though the decree should, *stricto sensu*, contain all the reliefs granted. This can be taken care of by specifically directing the office to draft decree, in accordance with relief granted in Para 19, since the settled principle is that the mistake of court shall injure none. The principle of the maxim *actus curiae neminem gravabit* which is founded on the Principle of Justice and good sense, and is a guide for the administration of law can be brought in aid in such circumstances. It has been held that an unintentional mistake of the court which may prejudice the cause of any party must and alone could be rectified. (Ref:Krishnaswamy SPD and another Vs. Union of

India ((2006) 3 SCC 286), at Para 16, Bihar Finance Service House Construction Co-operative Society Ltd. Vs. Gautam Goswami, ((2008) 5 SCC 339), D.Purushottama Reddy and another Vs. V.K.Satheesh (2008) 8 SCC 505))

13. The learned counsel for the defendant contended that as per the report of the Advocate Commissioner, the retention wall to be constructed shall have a minimum width of one meter at a stretch of 30.9mts. and a height of 10 mts. Construction of the wall, according to the counsel, will involve a very huge expenditure, and in the eventuality of the plaintiff constructing, the expenditure is likely to be very huge, than that incurred by the defendant. The apprehension of the defendant was that since the court below has given a blanket freedom to the plaintiff to reconstruct without stipulating that the plaintiff shall reconstruct at minimum expenses or at a reasonable expense, the wide power given to plaintiff is likely to be freely used by him. Though a situation of plaintiff constructing the wall arises only in case of defendants not

obeying the decree and at any time prior to that, the defendants can give effect to the decree voluntarily, the apprehension of the defendants cannot be completely brushed aside. The learned counsel pleaded that in the eventuality of the revision being allowed, an opportunity may be left open to the parties, to work out the further modality of satisfying the decree, if possible, through mediation, if parties so choose. The learned counsel for plaintiff did not oppose this request.

14. It appears that decree has reached its last stage of finality. Settlement through mediation, at least on certain aspects, even in a post decree scenario, is not barred. Section 89 C.P.C. empowers court to adopt the Alternate Dispute Resolution mechanism at any stage and does not prohibit a mediation post decree, and even at execution stage. Neither Section 89 nor the Afcons Infrastructure Ltd. Vs. Cherian Varkey Construction Co. (P) Ltd ((2010) 8 SCC 24) case imposes a complete restriction regarding the stage at any which, ADR mechanism is to be adopted.

The Hon'ble Supreme Court in Afcons case had laid down the appropriate stage at which the matter is to be referred for mediation. It was held that in civil suits, the appropriate stage would be after completion of pleadings. However, if for any reason, the court had missed the opportunity to consider and refer the matter to ADR process, nothing prevents the court from resorting to Section 89, even after framing issues. But once evidence is commenced, the court will be reluctant to refer the matter to ADR process lest it may become a tool for protracting the trial. Drawing cue from the above, it is evident that even at a subsequent stage, scope of mediation is not completely barred, though, as the litigation proceeds forward, the scope for ADR process should taper off. Conceptually, at a post decree stage, or even at execution stage, mediation is possible, subject to strict condition that if court is satisfied that the possible settlement is confined to the satisfaction of decree within Section 47 C.P.C and not intended to protract or delay the proceedings. Probably, the lapse of the time, the

long wait for a decree and dispute having been finally adjudicated, declared and thereby respective rights of the parties stand crystallized, may prompt parties to reach the final resolution of the dispute, in a more meaningful and pragmatic manner, having regard to realities, which may even help to heal the wounds, if any, caused in the process of litigation. Hence the doors of the mediation should be kept open, till decree is finally satisfied or becomes non executable, subject to above condition.

In the light of above findings, the impugned order is not legally sustainable and is liable to be set aside. Hence, the revision is allowed. Impugned order is set aside. The court below shall take back I.A.No.1178/2011, and pass such orders afresh after hearing both sides, including a direction to the office to draft decree in accordance with the relief granted by the court with reference to Para 19 of the judgment and to take back the decree already issued for making necessary corrections. Before the above orders are passed, if the parties are willing for a mediation with

respect to the satisfaction of all or any of the reliefs granted, parties may be given an opportunity to resolve or to give effect to the decree in part or completely through an appropriate process of mediation. Both sides shall appear before the court below on 28.10.2015.

Sd/-
SUNIL THOMAS,
JUDGE.

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PA to Judge