

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

MONDAY, THE 16TH DAY OF FEBRUARY 2015/27TH MAGHA, 1936

FAO (RO).No. 276 of 2014 ()

AS 105/2009 of PRL.SUB COURT, THIRUVANANTHAPURAM.
OS 256/2007 of I ADDL. MUNSIF COURT (RCC), THIRUVANANTHAPURAM.

APPELLANT(S)/RESPONDENT/DEFENDANT:

SUNDARAM HAMMOND
C/O.ASHOK GIANA CHANDAI, MADHURAM NO.70, HSR LAY OUT
4TH SECTOR, 4TH MAIN ROAD, OPPOSITE BDA COMPLEX
15TH CROSS, BANGALORE - 34.

BY ADVS.SRI.L.MOHANAN
SMT.LIGEY ANTONY

RESPONDENT(S)/APPELLANTS/PLAINTIFFS:

1. K. PADMANABHAN
S/O.KUNJAN, AMBADI, KUDAPPANAKUNNU P.O.
KUDAPPANAKUNNU VILLAGE, THIRUVANANTHAPURAM 695 510.

2. SANTHA KUMARI
SANTHI NIVAS, MOONNAMOODU
KODUNGANNOOR P.O.THIRUVANANTHAPURAM 695 013.

3. K.NAARASIMHAN
S/O.KUNJAN, -DO- -DO- 695 013.

R1 BY ADV. SRI.V.V.NANDAGOPAL NAMBIAR

THIS FIRST APPEAL FROM ORDER - REMAND ORDER HAVING BEEN FINALLY HEARD ON
29.1.2015 THE COURT ON 16.2.2015 DELIVERED THE FOLLOWING:

C.R.

P.B.SURESH KUMAR, J.

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FAO.(RO).No.276 of 2014.
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Dated 16th February, 2015.

J U D G M E N T

The decision of the Court of the Subordinate Judge, Thiruvananthapuram in A.S.No.105 of 2009 by which the suit O.S.No.256 of 2007 on the file of the Court of the Munsiff, Thiruvananthapuram was remitted for fresh disposal, is under challenge in this appeal. The appellant is the defendant in the suit.

2. O.S.No.256 of 2007 is a suit instituted by the respondents seeking a decree of permanent prohibitory injunction restraining the defendant from trespassing into the plaint schedule property and for ancillary reliefs. The plaint schedule property belonged to one Thanu Pillai. The plaintiffs are the brothers and sister of Thanu Pillai. According to the plaintiffs, Thanu Pillai was leading a spiritual life and he died unmarried and issueless and consequently, on his death, the plaint schedule property devolved on them and they are in

possession of the same. It was alleged that the defendant, who is a Christian by birth is attempting to trespass into the plaint schedule property pretending that she is the wife of Thanu Pillai.

3. The defendant contested the suit contending interalia that Thanu Pillai married her in accordance with the provisions of the Special Marriage Act on 4.6.1994 and they were living thereafter as husband and wife. According to her, she being the wife of Thanu Pillai, the plaint schedule property devolved on her on the death of Thanu Pillai. It is also her case that she was earlier married to one Freeman who was also a Christian and the said marriage was dissolved by the Family Court, Bangalore on 16.3.1994, as they embraced Hinduism after the marriage.

4. Ext.B1 is the certificate of marriage of the defendant with Thanu Pillai issued by the Marriage Officer under the Special Marriage Act. Ext.B8 is the order passed by the Family Court, Bangalore in M.C.No.657 of 1993 by which the court dissolved the marriage of the defendant with her former husband under the Hindu Marriage Act. Ext.B9 is a certificate issued by Arya Samaj to the defendant stating that she embraced Hinduism on 26.3.1992, after undergoing a

ceremony.

5. The trial court, on an evaluation of the materials on record, found that the defendant is the widow of Thanu Pillai and the plaintiffs are therefore, not entitled to the relief sought for in the suit. The plaintiffs challenged the decision of the trial court in appeal and the appellate court set aside the decree and judgment of the trial court and remitted the suit for fresh disposal. As indicated above, it is aggrieved by the said decision of the appellate court that this appeal is preferred.

6. Heard Sri.L.Mohanan, the learned counsel for the appellant and Sri.V.V.Nandagopal Nambiar, the learned counsel for the respondents.

7. The scope of the jurisdiction of the appellate court to remand a suit for fresh disposal needs to be understood for the purpose of deciding the correctness of the impugned decision. Rules 23, 23A and 25 of Order 41 of the Code of Civil Procedure are the relevant rules dealing with the limits of the jurisdiction of the appellate court to remand a suit for fresh disposal. The said rules read thus:

“23. Remand of case by Appellate Court -- Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and

shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, which directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject all just exceptions, be evidence during the trial after remand.

23A. Remand in other cases -- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.--Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;"

Prior to the insertion of Rule 23A in Order 41 of the Code by the of the Code Amendment Act, 1976, there were only two provisions in Order 41 contemplating remand by a court of appeal. They were Rule 23 and Rule 25. Rule 23 applies when the suit is disposed of on a preliminary issue and Rule 25 applies when the appellate court finds that the trial court omitted to frame and try an issue which was essential for the

right decision of the suit. There was no provision in the Code conferring power on the appellate court to remand a suit disposed of on merits, which does not come under Rule 25. At the same time, Rule 24 in Order 41 provided that where the evidence upon the record is sufficient to enable the appellate court to pronounce judgement, the appellate court may finally determine the suit, notwithstanding that the judgement of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the appellate court proceeds. Rule 24 in Order 41 has also conferred on the appellate court the power to resettle issues, if necessary for determining the suit finally. Therefore, it is evident that even prior to 1976 amendment, the scheme of Order 41 was that the appellate court shall finally decide all the suits, except those which come under Rule 23 and Rule 25, to ensure speedy justice. Despite the aforesaid provisions, it was settled then that in the absence of an enabling provision, the court could exercise its inherent jurisdiction under Section 151 of the Code to order a remand, if such a remand was considered necessary, though not covered by the specific provisions of Order 41 of the Code. In 1976, Rule 23A has been inserted in Order 41 which enables the appellate court to remand a suit for fresh disposal

if the decree is reversed in appeal and a retrial is considered necessary. The purpose of the said amendment was not to enlarge the scope of the jurisdiction of the appellate court to remand a suit for fresh disposal, but to prevent the court from exercising its inherent powers for the purpose of remanding a suit for fresh disposal. If the provisions in Order 41 is understood in the aforesaid manner, it is clear that after the introduction of Rule 23A, the appellate court can remand a suit for fresh disposal only in cases where the decree is reversed in appeal and a retrial is considered necessary. In view of the express provisions in Order 41 as aforesaid, the appellate court cannot now have recourse to its inherent powers to make a remand, for, it is well settled that the inherent powers can be availed of *ex debito justitiae* only in the absence of the express provisions in the Code. True, even after the introduction of Rule 23A, the appellate court can order remand of a suit in exceptional cases for correcting fundamental errors such as non-compliance of the provisions contained in Order 20 Rule 3, Order 41 Rule 31 of the Code etc., but not on a consideration of the merits of the case. [See **P. Purushottam Reddy v. Pratap Steels Ltd.** [(2002) 2 SCC 686 and **Municipal Corporation, Hyderabad v. Sunder Singh** [(2008)8 SCC

485].

8. Coming to the facts of the case, the impugned judgment of the appellate court does not reverse the decree of the trial court nor does it arrive at a finding that a re-trial is necessary in the matter. On the other hand, it is seen that the decree of the trial court was set aside, for, the appellate court felt that the evidence tendered by the defendant needs clarity. It is stated by the appellate court that the defendant has not proved that Ext.B8 judgment is in respect of her marriage. Likewise, it is also stated by the appellate court that Ext.B9 certificate was not proved by the defendant by examining the authority which issued the same. It is further stated by the appellate court that the defendant ought to have adduced evidence to show that her former husband Freeman has also embraced Hinduism and that the application for dissolution of marriage before the Family Court, Bangalore was filed by her with her former husband. There is no finding by the appellate court that in the absence of the aforesaid evidence, the decree of the trial court is liable to be reversed and that for a proper adjudication of the suit upon the merits, a retrial is necessary. I am afraid, in the light of the provisions contained in Order 41 of the Code as referred to by me, an order of remand cannot be

made for the aforesaid reasons. As indicated above, an order of remand can be passed by the appellate court in a suit disposed of otherwise than on a preliminary point only when the decree impugned is reversed and a retrial is considered necessary. There is no power for the appellate court to remand a suit for fresh disposal on the ground that the evidence adduced by a party needs clarity. The appellate court cannot throw its hands up for its inability to decide a matter. In the light of the provisions contained in Rule 24 of Order 41, the appellate court is duty bound to decide the appeal based on the available materials.

9. Coming to Ext.B8 judgment, the Hindu marriage Act contemplates not only dissolution of the marriages of Hindus, but also dissolution of marriages of persons who have embraced Hinduism. Explanation to Section 2(1)(c) of the Hindu marriage Act clarifies the said position. Ext.B8 is the certified copy of an order passed by a Family Court under Section 13B of the Hindu marriage Act. The plaintiffs have no case that there was no such proceedings before the Family Court. The defendant is a party to Ext.B8. She gave evidence that Ext.B8 is the certified copy of the judgment issued by the Family Court by which her marriage with her former husband

was dissolved. I fail to understand as to what more is expected from the defendant in a case like this to prove that her marriage with her former husband was dissolved by a judgment passed by the Family Court. Section 41 of the Indian Evidence Act provides that such orders are conclusive proof of the legal character it declares to have accrued to that person. The view of the appellate court that the defendant has not proved that the marriage that was dissolved as per the said judgment is the marriage of the defendant with her former husband, is unsustainable. The defendant was though cross-examined at length by the plaintiffs, there was no suggestion to her that the said person was not the former husband of the defendant. The view of the appellate court that the defendant should have proved Ext.B9 by examining the authority which issued the said document is equally unsustainable. Ext.B9 document was produced by the defendant to prove that she embraced Hinduism. There is no statute dealing with the conversion to Hindu faith. There is also no procedure prescribed under the pristine Hindu law for conversion to Hinduism. No formal ceremony of purification or expiation is necessary to effectuate conversion. On the other hand, it is settled that an assertion on the part of the person concerned

that he/she embraced Hinduism is liable to be given due weight. The conduct of the person concerned after the conversion is also relevant. The courts are expected to decide the question as to whether a particular person embraced Hinduism based on the materials available on record and not based on any certificate issued by any organisation.

10. The learned counsel for the respondents pointed out, relying on a decision of the Apex Court in **Perumal Nadar v. Ponnuswami Nadar** (AIR 1971 SC 2352) that a mere theoretical allegiance to the Hindu faith by a person born in another faith does not convert him into a Hindu nor is a bare declaration that he is a Hindu sufficient to convert him to Hinduism. It was also contended that a bonafide intention to be converted to Hindu faith; accompanied by conduct unequivocally expressing that intention shall be established to prove conversion. There cannot be any quarrel at all to the aforesaid propositions laid down by the Apex Court. I am not called upon to decide the question as to whether the defendant has embraced Hinduism. I am also not venturing to decide the issue as to whether the defendant has embraced Hinduism or not, for, the said issue does not arise for consideration in this appeal. The learned counsel for the respondents has also

submitted, relying on the decision of the Apex Court in **Bachahan Devi and another v. Nagar Nigam, Gorakhpur and another** [(2008)12 SCC 372] that if the decision on an issue requires additional evidence, the remand of the matter is mandatory. The said decision is a decision rendered interpreting the provision in Rule 25 of Order 41 of the Code and the said decision, therefore, may not have any application to the facts of this case.

In the result, the impugned judgment is liable to be set aside and I do so. The appellate court is directed to dispose of the appeal finally on the basis of the materials on record.

**Sd/- P.B.SURESH KUMAR,
(Judge)**

Kvs/-

(true copy)

PA TO JUDGE.