



2010 PLRonline 0101 (Ker.)

KERALA HIGH COURT

Before : Justice Thomas P. Joseph.

MARY & others - Petitioners

Versus

BIJU P. SEBASTIAN – Respondent.

WP(C). No. 18303 of 2010.

14.6.2010

(i) Civil Procedure Code, Order 40 Rule 1 - "just and convenient" explained - *AIR 1955 Madras 430 relied.*

What is meant by "just and convenient" ? The word, "just" is derived from the Latin word "justus" which came from the Latin word, "jus" which means "a right, more technically a legal right". The word "just" is defined in Century Dictionary as "right in Law or ethics". In the Standard Dictionary that word is defined as meaning "conforming to the requirements of right or positive law". The word "convenience" means "suitability of a thing". Fletcher Moulton, CJ. in *Edwards & Co. v. Picard [(1909) 2 KB 903]* has construed the expression "just or convenient" occurring in the Judicature Act, Section 25(8) thus : "The effect of the words "just or convenient" is to my mind much the same as "where it is practicable and the interest of justice require it". Jessel, M.R. in *Beddow v. Beddow [(1878) 9 Ch.Div. 89]* stated that in ascertaining what is "just", regard must be had to what is "convenient" as well.

[Para 4]

(ii) Civil Procedure Code, Order 40 Rule 1 - Receiver is regarded as one of the harshest remedy which the law provides for the enforcement of its rights - The principles relating

to appointment of a Receiver can be enumerated as under :

i. The object of appointing a Receiver is to preserve the subject matter of litigation pending decision of the case.

ii. Court has the discretion to appoint Receiver when it appears to the court to be just and convenient to do so.

iii. The discretion must not be exercised arbitrarily or in an unregulated manner. It must be exercised judicially and cautiously and in accordance with the legal principles on a consideration of the whole circumstances of the case bearing in mind that 'discretion' is the power to do justice and it in itself implies a vigilant circumspection and care.

iv. Appointment of a Receiver is considered to be a very harsh remedy and hence the jurisdiction has to be exercised only in extreme cases with utmost care and caution.

v. Court while considering question of appointment of Receiver does not finally decide on merit of the case.

vi. A Receiver cannot be appointed merely because it is expedient to do so; nor merely because it will do no harm to do so.

[Para 6]

Cases Referred :-

1. *Pyarelal v. State of Rajasthan, AIR 1963 Supreme Court 1094.*
2. *Hedley v. Bates, (1879-80) 13 Ch.Div. 498.*
3. *Holmes v. Millage, (1893) 1 QB 551.*
4. *Edwards & Co. v. Picard, (1909) 2 KB 903.*
5. *Beddow v. Beddow, (1878) 9 Ch.Div. 89.*
6. *Srimathi Prosonomoyi Devi v. Ma Hob Rai, (1883) 5 ILR Allahabad 556.*
7. *Krishna Swamy Chetty v. Thangavelu Chetty, AIR 1955 Madras 430.*
8. *Crawford v. Ross, 39 Ga 44 (Z 28).*
9. *Dozier v. Logan, 101 Ga 173 (Z 29).*

10. *Benoy Krishna Mukherjee v. Satish Chandra Giri*, AIR 1928 Privy Council 49.
11. *Firm Ashok Traders v. Gurumukh Das Saluja*, 2004(1) RCR (Civil) 725 : (2004) 3 SCC 155.
12. *Kuttappan v. Sarojini Bhaskaran*, 1998(2) KLT 406.

For the Petitioner :- Sri. Mathew John (K), Advocate. For the Respondent :- No Appearance.

JUDGMENT

Thomas P. Joseph, J. - Petitioners are aggrieved as learned Munsiff has declined to appoint a Receiver for the suit property.

2. The Civil Procedure Code, 1908 (for short, "the Code") has invested with the court a discretionary jurisdiction to appoint a Receiver when it appears to the court "to be just and convenient" to do so. As the provision reads the discretionary jurisdiction arises only when it is shown that it is "just and convenient" to appoint a Receiver. It is relevant to note how that expression came into the Code.

3. The Civil Procedure Code, 1882 (for short, "the Code of 1882") dealt with the power of court to appoint a Receiver thus :

"Chapter XXXVI

Appointment of Receivers.

503. *Whenever it appears to the court to be necessary* for the realisation, preservation or better custody or management of any property, movable or immovable, the subject of a suit, or under attachment, the court may by order -

- (a) appoint a Receiver of such property (and, if need be),
- (b) remove the person in whose possession or custody the property may be from the possession or custody thereof;
- (c) commit the same to the custody or management of such Receiver; and
- (d) " (emphasis supplied)

The law in England regarding appointment of a Receiver is stated in the Supreme Court of

Judicature Act, 1873 (for short, "the Judicature Act"), Section 25 (8) as under :

"A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just;....." (emphasis supplied)

In the Code (of 1908) the relevant provision is as under :

"Order XL Appointment of Receivers

(1) where it appears to the Court to be just and convenient, the Court may by order -

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver;
- (d) " (emphasis supplied)

The notable change brought into the Code (of 1908) which continues to be so even after the amendment, from the Code of 1882 is that the court is invested with the discretionary jurisdiction to appoint a Receiver only when it appears to the court to be "just and convenient" to do so while in the Code of 1882 the court had the power to appoint a Receiver when it appeared to be necessary for the realisation, preservation or better custody or management of the property. The Supreme Court in ***Pyarelal v. State of Rajasthan (AIR 1963 Supreme Court 1094)*** has stated that the appropriate meaning of the word "appears" is "seems". The expression "just and convenient" occurring in Order 40 Rule 1 of the Code and which was not there in the corresponding provision (Sec.503) of the Code of 1882 was adopted from the Judicature Act, 1873, Section 25(8) which I have extracted above. In the Judicature Act, Section 25(8) the expression used is "just or convenient". In the Code (of 1908) in Order 40 Rule 1, the expression used is "just

and convenient". Jessel, M.R. in **Hedley v. Bates [(1879-80) 13 Ch.Div. 498]** and Lindley, CJ. in **Holmes v. Millage [(1893) 1 QB 551]** have read the expression "just or convenient" occurring in the Judicature Act, Section 25(8) as "just and convenient".

4. What is meant by "just and convenient" ? The word, "just" is derived from the Latin word "justus" which came from the Latin word, "jus" which means "a right, more technically a legal right". The word "just" is defined in Century Dictionary as "right in Law or ethics". In the Standard Dictionary that word is defined as meaning "conforming to the requirements of right or positive law". The word "convenience" means "suitability of a thing". Fletcher Moulton, CJ. in **Edwards & Co. v. Picard [(1909) 2 KB 903]** has construed the expression "just or convenient" occurring in the Judicature Act, Section 25(8) thus :

"The effect of the words "just or convenient" is to my mind much the same as "where it is practicable and the interest of justice require it".

Jessel, M.R. in **Beddow v. Beddow [(1878) 9 Ch.Div. 89]** stated that in ascertaining what is "just", regard must be had to what is "convenient" as well.

5. Lindley, CJ. stated in **Holmes v. Millage** (supra) that court should appoint a Receiver for the protection of rights or for the prevention of injury, according to the legal principles. Referring to Section 503 of the Code of 1882 (quoted supra) Straight, J. held in **Srimathi Prosonomoyi Devi and another v. Ma Hob Rai and others [(1883) 5 ILR Allahabad 556]** that the power (for appointment of a Receiver) is not to be exercised as a matter of course and that it is not a reason for allowing an application for appointment of a Receiver that it can do no harm to appoint one. The discretion given by that Section is one that should be used with the greatest care and caution. The Madras High Court in **Krishna Swamy Chetty v. Thangavelu Chetty and others (AIR 1955 Madras 430)** has quoted with approval the following passage from **Crawford v. Ross [39 Ga 44 (Z 28)]** :

"The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong immediately impending."

Reference was also made to the following words of Atkinson, J. in **Dozier v. Logan [101 Ga 173 (Z 29)]**:

"The appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the creditors is exposed to manifest peril"

6. To order appointment of a Receiver the person seeking appointment has to show that he has a strong case and *prima facie* title to the property and further that the property in dispute is in danger of being wasted away or damaged. Appointment of the Receiver is a matter of judicial discretion intended to safeguard the rights of parties and that ends of justice are not defeated. A Receiver cannot be appointed merely because it is expedient or convenient to one of the parties; instead, it must be "just and convenient" meaning thereby that it is just and convenient to both parties. Nor can a Receiver be appointed merely because it will do no harm to do so. A well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the court gives its protection is a good ground to appoint a Receiver. Viscount Sumner said in **Benoy Krishna Mukherjee v. Satish Chandra Giri (AIR 1928 Privy Council 49)**,

"On an interim application for a receivership such as this, the Court has to consider whether special interference with the possession of a defendant is required, there being a well founded fear that the property in question will be dissipated or that other irreparable mischief may be done unless the Court gives its protection. Such an order is

discretionary, and the discretion is, in the first instance, that of the Court in which the suit itself is pending."

(emphasis supplied)

Appointment of a Receiver is regarded as one of the harshest remedy which the law provides for the enforcement of its rights. That remedy is available only in extreme cases and in circumstances where interest of the person seeking appointment of Receiver is exposed to manifest peril. Appointment of a Receiver is an exceedingly delicate and responsible duty of court which it has to discharge with utmost care and caution and only when it is satisfied that the requirements embodied in the expression "just and convenient" occurring in Order 40 Rule 1 of the Code is fulfilled by the facts of the case. (See **Krishna Swamy Chetty v. Thangavelu Chetty and others** - supra). The principles relating to appointment of a Receiver can be enumerated as under :

- i. The object of appointing a Receiver is to preserve the subject matter of litigation pending decision of the case.
- ii. Court has the discretion to appoint Receiver when it appears to the court to be just and convenient to do so.
- iii. The discretion must not be exercised arbitrarily or in an unregulated manner. It must be exercised judicially and cautiously and in accordance with the legal principles on a consideration of the whole circumstances of the case bearing in mind that 'discretion' is the power to do justice and it in itself implies a vigilant circumspection and care.
- iv. Appointment of a Receiver is considered to be a very harsh remedy and hence the jurisdiction has to be exercised only in extreme cases with utmost care and caution.
- v. Court while considering question of appointment of Receiver does not finally decide on merit of the case.
- vi. A Receiver cannot be appointed merely because it is expedient to do so;

nor merely because it will do no harm to do so.

7. In the present case according to the respondent/plaintiff suit property belonged to the late Chacko (husband of petitioner No. 1 and father of petitioner Nos.2 and 3) and from 1984 onwards (though, the document in respect of the suit property was executed in his favour only in 2007) the late Chacko residing single in the building situated in the suit property, petitioners being in estranged relationship with him and staying away. It is also the case of respondent that he, as nephew of the late Chacko was looking after him until his death. Chacko executed a Will on 10.03.2009 bequeathing the suit property to him. Chacko died on 20.09.2009. Since then he (respondent) is the absolute owner in possession of the suit property. Apprehending that petitioners might trespass into the suit property he instituted O.S.No. 284 of 2009 in the court of learned Munsiff. While admitting that there was some estranged relationship between petitioner No. 1 and the late Chacko, petitioners contended that the children, petitioner Nos.2 and 3 were keeping good relationship with the late Chacko. Petitioners challenged genuineness of the Will and claimed that it is a forged document. According to them the late Chacko was hospitalised in the 2nd week of August, 2009 and he died on 20.09.2009. Petitioners made a counter claim against respondent for a mandatory injunction to direct the latter to vacate the building in the suit property. The Advocate Commissioner inspected suit property and reported that respondent has cut down an anjilee tree from that property a few days before his inspection. On I.A. No. 392 of 2010 learned Munsiff passed an order of injunction restraining respondent from committing waste in the suit property. Petitioners then filed I.A.No. 547 of 2010 to appoint a Receiver for the suit property. Learned Munsiff held that circumstances did not warrant the harshest step of appointing a Receiver for the suit property and declined to do so. Learned counsel for petitioners, placing reliance on the decision of the Supreme Court in **Firm Ashok Traders and another v. Gurumukh Das Saluja and others 2004(1) RCR (Civil) 725 :**

((2004) 3 SCC 155 (paragraph No. 15)) has contended that this is a fit case where a Receiver ought to be appointed. Learned counsel contended that respondent has not even the semblance of a right in the suit property as the document produced by petitioners show that the Will is a forged document. Learned counsel has referred me to the disputed Will and Ext.P3, a certificate dated 21.12.2009 issued by the Secretary of Karimannoor Service Co-operative Bank.

8. In the Will dated 10.03.2009 there is a direction to the respondent to pay the loan availed by the late Chacko from the said bank on the security of suit property. But Ext.P3 states that there was no such liability over the property in that, the late Chacko had only applied for a loan on 25.08.2009 on the security of the property but since in the meantime he died, that loan application was not pursued. Attempt of petitioners is to show that reference in the Will dated 10.03.2009 to the liability over property in favour of the said Bank would show that the Will dated 10.03.2009 is not genuine since Ext.P3 shows that on 10.03.2009 the late Chacko had not even applied for a loan from the said Bank. I am afraid there can be no finding regarding genuineness of the Will or any observation concerning that at this stage as genuineness of the Will is a matter to be proved at the time of trial of the suit if such a course is required. Respondent has sued for a decree for prohibitory injunction on the premise that he is in absolute possession of the property. Though petitioners prayed for a decree for mandatory injunction to direct respondent to vacate the building in the suit property, they have not asked for any relief with respect to the rest of the suit property. They do not admit that respondent is in 'possession' of the building, not to say about rest of the suit property as is clear from the fact that they have only asked for a mandatory injunction that respondent has to vacate the building and for damages for its use and occupation. In such a situation it is not made out why petitioners want a Receiver to take possession of the property. Their only grievance is that respondent has cut and removed one anjilee tree from the suit

property (before the learned Munsiff issued an order of injunction against respondent committing waste in the suit property) which the respondent does not deny. There is no case for petitioners that the property is in danger of being wasted or damaged, that the property will be dissipated or other irreparable mischief may be done to the property unless a Receiver is appointed. Petitioners have no case that respondent has violated the order of injunction against him. That, respondent who claims title and possession over the suit property and at a time when there was no order of injunction against him has cut down a tree from the suit property on 22.02.2010, without anything more, does not make it "just and convenient" to appoint a Receiver for the suit property. Having regard to the facts and circumstances including that there is no case of violation of order of injunction against respondent committing waste in the suit property I am not satisfied that it is "just and convenient" to appoint a Receiver for the suit property.

9. Learned counsel apprehends that respondent might commit waste in the suit property in future. If it happens, petitioners are not without any remedy. If future events make it "just and convenient" to appoint a Receiver, the court has the power to invoke its jurisdiction. This Court in ***Kuttappan v. Sarojini Bhaskaran (1998 (2) KLT 406)*** has held that dismissal of an earlier application for appointment of a Receiver will not be a bar if the court finds that some other circumstances exists which necessitate the appointment of a Receiver.

The Writ Petition fails. It is dismissed.

Petition dismissed.