

(1955) 01 KL CK 0003

High Court Of Kerala

Case No: Second Appeal No. 13 of 1954 (T)

Peerumuhammad Raotha Pillai

APPELLANT

Vs

Kassim Pillai Peerukannu and
others

RESPONDENT

Date of Decision: Jan. 3, 1955

Acts Referred:

- Limitation Act, 1963 - Article 44, 3

Citation: AIR 1955 Ker 188

Hon'ble Judges: T.K. Joseph, J

Bench: Single Bench

Advocate: N. Krishnaswamy Iyengar, for the Appellant; S. Easwara Iyer, for the Respondent

Final Decision: Allowed

Judgement

T.K. Joseph, J.

Defendant 1 is the appellant. The four plaintiffs of whom the 2nd and 3rd were minors on the date of the suit sued for cancellation of a sale deed executed by their deceased father Kasim Pillai and their elder brothers defendants 2 and 3 to defendant 1 and for recovery of possession of the property with mesne profits. All the plaintiffs were minors on the date of the sale deed Ex. A dated 13-8-1117 and their father who was their lawful guardian executed the deed in that capacity.

The property originally belonged to the deceased mother of the plaintiffs and defendants 2 and 3. It was alleged by the plaintiffs that the sale deed was unsupported by consideration and necessity and that it was invalid. The mesne profits from the whole property were estimated at 110 fanams per annum. Defendant 1 contended that the sale deed was supported by consideration and necessity and that the sale was a valid transaction and that in any event defendants 2 and 3 and their father were competent to sell their shares in the property.

It was also contended that defendant 1 had effected valuable improvements after the purchase and that the amount claimed as mesne profits was excessive. The trial court set aside the sale deed in respect of plaintiff's 21/44th share of the plaint property. Proportionate mesne profits were allowed at the rate claimed in the plaint. Defendant 1 preferred an appeal to the District Court which proved unsuccessful.

He had raised a plea of limitation in the lower appellate court but the court refused to consider the same on the ground that the plea was not raised in the court of first instance. Defendant 1 has preferred this Second Appeal from the concurrent decrees against him.

2. The first point urged on behalf of the appellant is that the plea of limitation should have been upheld even though it was not raised in the trial court. This argument was based on S. 3 and Art. 44, Indian Limitation Act. Article 44 provides for a period of three years for a suit by a ward who has attained majority to set aside a transfer of property by his guardian, the starting point of limitation being the date on which the ward attains majority.

It was contended that on the averments in the plaint the suit was *prima facie* barred by limitation in respect of the shares of plaintiffs 1 and 4 who were 25 and 23 years of age respectively on the date of the suit. The sale deed in question was executed by their father who was their "de jure" guardian. It was also urged that under S. 3, Limitation Act, the court had a duty to see whether the suit was barred by limitation even though the plea of limitation was not set up by defendant 1 in the trial court.

This section compels the court to dismiss the suit if it is time-barred although the defence of limitation has not been set up and the plaintiff must show that his suit has been instituted within the period of limitation or that there are circumstances which take his case out of the ordinary period of limitation. The burden rests in the first instance upon the plaintiff to show that his suit is not instituted after the period prescribed therefor by the first schedule.

Section 3, Limitation Act is peremptory and it is the duty of the court to notice the Limitation Act and give effect to it even if it is not referred to in the pleadings. The appellate court is not bound to consider a plea of limitation set up for the first time in appeal if it is a mixed question of fact and law and the question cannot be decided without taking fresh evidence. The defence of limitation which was raised in the lower appellate court was one which could be decided without taking any evidence, because on the averments in the plaint the suit was "*prima facie*" barred by limitation in respect of the shares of plaintiffs 1 and 4 and no case of exemption was pleaded.

The suit was instituted more than three years-after plaintiffs 1 and 4 attained majority and it is admitted that Kasim Pillai their father and guardian acted on their behalf in executing the deed. In my opinion the lower appellate court was not right in declining to consider the defence of limitation. I hold that the suit as regards the

shares of plaintiffs 1 and 4 is barred under Art. 44, Limitation Act and that plaintiffs 2 and 3 alone are entitled to have the sale deed cancelled in respect of their respective shares.

Learned counsel for the appellant fairly conceded that the sale deed could not be upheld in respect of the shares of plaintiffs 2 and 3 as the sale was not effected for any of the approved purposes under Muhammadan Law. The sale deed Ex. A is therefore set aside in respect of the 12/44th share of plaintiffs 2 and 3 and their right to recover possession of such share is declared.

3. No evidence was adduced to prove the claim in respect of value of improvements. It must, therefore, be taken that defendant 1 had not effected any improvements after the date of the sale. As regards the claim for mesne profits defendant 1 did not state what the mesne profits would be and the courts below have accepted the plaintiffs' estimate of the same. The decree in respect of mesne profits does not therefore require interference except to the extent of making proportionate reduction in the light of the finding regarding the claims of plaintiffs 1 and 4.

4. In the result, the sale deed Ex. A is set aside in respect of the 12/44th share of plaintiffs 2 and 3 and they are given a decree for recovery of the same. This will be treated as a preliminary decree. The trial court will pass a final decree for partition of the said share viz., 12/44, by metes and bounds. Plaintiffs 2 and 3 are allowed mesne profits at the rate of 30 fanams per annum for the period for which the same is claimed before the date of the suit and thereafter at the same rate subject to the statutory limits.

The Second Appeal is allowed to the above extent and dismissed in other respects. Plaintiffs 2 and 3 are allowed 1/4th of their costs hitherto incurred and defendant 1 will bear his costs. Costs incurred hereafter will be provided for in the final decree.