Thomman Parakkal Vs Madhavan Arakkaparambil and others

Court: High Court Of Kerala

Date of Decision: March 31, 1953

Acts Referred: Cochin Limitation Act, 1908 â€" Article 34
Limitation Act, 1908 â€" Article 34

Citation: AIR 1953 Ker 197

Hon'ble Judges: Kumara Pillai, J

Bench: Single Bench

Advocate: T.S. Venkiteswara Iyer and C.S. Ananthaknshna Iyer, for the Appellant; K. Sankara Kurup, N.K. Narayana Pillai and P. Kochukunni Achen, for the Respondent

Final Decision: Dismissed

Judgement

Kumara Pillai, J.
This second appeal arises out of a suit for cancellation of a deed of assignment of sale and recovery of possession of

property comprised therein with past and future mense profits.

2. Plaintiffs 1 and 2 and defendants 2 and 3 are brothers; and P.W. 1 is their father. They are governed by Hindu Law. In 1100, when plaintiff 2

was unborn and plaintiff 1 and defendants 2 and 3 were minors, P.W. 1 executed Ext. IV sale deed in favour of his wife Thulasi and his three sons

for the suit properties in this case and certain other properties. By the terms of the sale deed the properties were given to plaintiff 1 and defendants

1 and 3 and the sons that might be born in future of P.W. 1 and his wife Thulasi.

After defendants 2 and 3 attained majority and when plaintiffs 1 and 2 were still minors, P.W. 1 and Thulasi and defendants 2 and 3 executed Ext.

XXVIII, deed of assignment or sale, to defendant 1 for the plaint properties. The document was executed on behalf of plaintiffs 1 and 2 who were

minors by. Their mother Thulasi as their guardian. The suit was filed by plaintiffs 1 and 2 for cancellation of Ext. XXVIII in so far as their share in

the plaint property was concerned and for recovery of possession of the same with past and future mesne profits.

They claimed that they were entitled to 2/4th share in the suit property and that the mesne profits in respect of their shares would be 40 paras of

paddy per year. Exhibit XXVIII was sought to be set aside on the ground that it was not supported by necessity and consideration binding on the

plaintiffs, that it was not executed on their behalf by their legal guardian, that the price of Rs. 444/- for which the property was sold was grossly

inadequate, and that the document was not therefore binding on them. Defendant 1 contested the suit.

He contended that Ext. XXVIII was not acted upon and the title and possession of the plaint property continued with P.W. 1 even after its

execution, that the document was invalid in law as it was a gift and one of the donees was unborn at the time of the gift, that Ext. XXVIII was

supported by consideration and necessity and the price paid thereunder was proper and fair, and that the suit was also barred by limitation. The

correctness of the shares and mesne profits claimed by the plaintiff were also disputed by him.

3. The original Court found that Ext. XXVIII had taken effect but plaintiff 2 had not obtained any right thereunder as he was unborn at the time of

its execution, that the sale deed was not supported by consideration and necessity binding on plaintiffs 1 and 2 that the price for which the property

was sold was very low, and that the sale deed was therefore liable to be set aside so far as plaintiff 1 was concerned. Since the original Court had

found that plaintiff 2 had not obtained any right under Ext. XXVIII by reason of his having been unborn at the time of its execution, that Court also

held that plaintiff 1''s share was one-third of the plaint property.

Consequently it passed a decree setting aside Ext. XXVIII so far as plaintiff 1''s one-third share was concerned and allowing him to recover

possession of his share after partition by metes and bounds with mesne profits at the rate of 22 1/2 paras of paddy per year from 32-1-1120.

Against this decree both defendant 1 and plaintiff 2 preferred appeals in the District Court of Anjikaimal and plaintiff 1 also filed a cross appeal in

regard to the costs which he had been directed to bear. The District Court allowed in full the appeal filed by plaintiff 2 and the cross appeal filed by

plaintiff 1, holding that plaintiff 2 was also entitled to a share in the plaint property, that each of the plaintiffs was entitled to one-fourth share in the

property, and that the plaintiffs were also entitled to get their costs.

In the appeal filed by defendant 1 it was found that Ext. XXVIII was supported by consideration to the extent of Rs. 110/- and was not supported

by consideration and necessity binding on the plaintiffs in regard to the balance amount thereunder. The District Court found against all the other

contentions of defendant 1 and directed a decree to be passed in the following terms:

There will be a decree in favour of the plaintiffs as sued for in their plaint, their claim for mesne profits being limited to 33 3/4 paras of paddy per

annum from 32-1-1120, with costs both here and in the Court below with interest of 6 per cent. per annum from the date of this decree, against

D1 and his half share in the suit property. D1 (the appellant in A.S. 37/22) will similarly have a decree for Rs. 110/- with interest at 6 per cent. per

annum thereon from 32-1-1120 against the plaintiffs and their half share in the suit property.

Mutual set off is allowed. Dl will suffer his costs in both the appeals.

This second appeal is filed by defendant I against the above decree.

4. Three points were urged here by the appellant"s counsel: They were: (i) Ext. XXVIII was supported by necessity and consideration binding on

plaintiffs 1 and 2; (ii) plaintiff 2 has no right to the plaint property as he was unborn at the time of the execution of Ext. XXVIII; and (iii) the right of

plaintiff 1 to get Ext. XXVIII set aside is barred by limitation under Art. 34, Cochin Limitation Act, corresponding to Art. 44, Indian Limitation

Act.

5. The lower appellate Court has found that Ext. XXVIII was supported by consideration to the extent of Rs. 110/-. Regarding the balance

amount the Courts below concurrently found that the document was not supported by consideration and necessity binding on plaintiffs 1 and 2.

The findings in regard to the balance were impeached in this Court on the ground that they were opposed to the weight of the evidence in the case.

In view of the concurrent findings on a question of fact, it is not open to this Court to re-examine the evidence on the question of consideration and

necessity in regard to the balance amount.

The Courts below have duly considered the oral and documentary evidence bearing on this question, and in my opinion their findings on the point

are right and proper. No question of law is involved in the consideration of this matter.

6. On the second point urged in this Court, the decision of the trial Court was in favour of defendant 1 and that of the lower appellate Court was

against him. The lower appellate Court decided the point against defendant 1 on the ground that the Acts passed in British India allowing gifts in

favour of unborn persons by persons governed by Hindu Law have been adopted by the community of the plaintiffs and P.W. 1. The dictum in 33

Cochin LR 79 (A) was relied upon by the lower appellate Court for holding that subsequent amendments in the law made in British India could be

made applicable in Cochin on proof of their adoption by the concerned community.

It is not necessary for the purpose of this case to decide the question whether subsequent amendments to Hindu Law passed by Legislatures in

British India can be made applicable in Cochin on proof of their adoption by the concerned communities here. It has been found in this case that

Ext. IV took effect, and so it cannot be denied that at any rate plaintiff 1 and defendants 2 and 3 got the plaint property thereunder. It was open to

the persons who thus got the plaint property to give the whole of what they got or a part of it to any other person.

Exhibits V, VI and X are documents executed by P.W. 1 and defendants 2 and 3 and Thulasi as guardian of the minor plaintiffs in regard to the

plaint property and other items comprised in Ext. IV saying, or recognising, that plaintiff 2 was also entitled to a share in those properties. Plaintiff 1

and defendants 2 and 3 do not impeach these documents, and have accepted them as binding on them. Other documents have also been produced

in this case by which defendants 2 and 3 and plaintiff 1 have recognised that plaintiff 2 is also entitled to a share in the properties comprised in Ext.

IV.

Exhibits V, VI and X came into existence long before Ext. XXVIII. In Ext. XXVIII itself the right of plaintiff 2 to a share in the plaint property is

admitted, for it is executed on his behalf also. In the circumstances I hold that plaintiff 2 is also entitled to a share in the plaint property and that the

decision of the lower appellate Court that he had one-forth share in the plaint item is correct.

7. As regards the plea of limitation, the appellant''s case is that, since Thulasi had joined in the execution of Ext. XXVIII as the guardian of plaintiffs

1 and 2, the suit should have been filed within three years of the date of its execution. Under Art. 44, Indian Limitation Act (Art. 34, Cochin

Limitation Act) a suit by a ward who has attained majority to set aside a transfer of property by his guardian has to be filed within three years of

the time the ward attains majority.

It is contended that Thulasi was the guardian of plaintiffs 1 and 2 at the time of the execution of Ext. XXVIII and that, since plaintiff 1 was more

than 21 years old at the time of the institution of the suit, the suit in so far as he is concerned is barred by limitation. The natural guardian of plaintiffs

1 and 2 at the time of the execution of Ext. XXVIII was their father, P.W. 1. It is said at p. 289 of Edn. 11 of Mayne''s Hindu Law that the father

is the natural guardian of his children and that this guardianship is in the nature of a sacred trust and he cannot therefore during his lifetime substitute

another person to be guardian in his place.

On account of the fact that P.W. 1 and Thulasi had both joined in the execution of Ext. XXVIII it was contended that Ext. XXVIII must be taken

to have been executed on behalf of plaintiffs 1 and 2 by their natural guardian. In - ''Narayanan Thirumulpad v. Kutty Moosa'', 21 Cochin LR 413

(B), it was held that, in view of the recital in the document that the mother was the person who was acting as the guardian of the minors, the father

could not be deemed to have represented them and that therefore the document was void as against them.

In Ext. XXVIII also it is stated that Thulasi, the mother, was acting as guardian of the minors. Exhibit XXVIII cannot, therefore, be taken as a

document executed on behalf of the minors by their natural guardian. The appellant''s counsel contended that Ext. XXVIII was at any rate a

document executed on behalf of the minors by their ''de facto'' guardian and that plaintiff 1 was bound to institute the suit within three years of his

attaining majority. In - Ethilavulu Ammal and Others Vs. Pethakkal and Others, it was held that in view of the decision of the Full Bench in -

Karinagisetti Chennappa Vs. Karinagisetti Onkarappa, , Indian Limitation Act has no application to a transfer of property of a Hindu minor by a

de facto guardian.

The reason for this is said to be that the Article applies only to a transfer by the guardian which is binding on the ward till it is set aside whereas a

transfer by a ''de facto'' guardian of a Hindu minor is not such a transfer. In - ''Chitaley''s Commentaries on Indian Limitation Act, Edn. 3, it is said

at pp. 1189 and 1190:

No doubt that ''de facto'' guardian of a Hindu minor is entitled to transfer the minor''s property for a valid necessity. It has also been held that a

transfer by the guardian without such necessity it not totally void but only voidable at the option of the ward. But, it would seem that this only

means that a transfer by the guardian which is not supported by necessity is capable of ratification by the minor on attaining majority and not that it

binding on him until it is set aside.

Hence, the setting aside of the transaction is not a condition precedent to the ward recovering the property from the alienee. The ward can treat the

alienation as a nullity and simply sue for possession of the property. Such a suit will be governed not by this Article but by Art. 142 or Art. 144.

In the circumstances, I hold that Art. 44 does not apply to the present suit.

8. The second appeal therefore fails and is dismissed with costs.