(1966) 07 KL CK 0036

High Court Of Kerala

Case No: S.A. No. 530 of 1962

Gopala Menon		APPELLANT
	Vs	
Sivarama Menon and others		RESPONDENT

Date of Decision: July 21, 1966

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1(1)

Citation: (1966) KLJ 1076

Hon'ble Judges: T.C. Raghavan, J

Bench: Single Bench

Advocate: M.K. Narayana Menon, C.S. Narayanan and T.N. Harindran, for the Appellant; K.N. Narayanan Nair, G.R. Panicker and N. Sudhakaran for Respondent No. 1, S. Narayana Iyer for Respondent Nos. 2, 3, 5 and 6, M.K. Stanley and V.G. Balakrishna Menon for Respondent No. 4 and V. Sankara Menon, for the Respondent

Final Decision: Dismissed

Judgement

T.C. Raghavan, J.

The first defendant in a suit for setting aside an earlier partition and for a re-partition is the appellant and some of the defendants the contesting respondents. The plaintiff, whose suit was decreed by the trial court and who contested the appeal by the first defendant before the lower appellate court, has filed C.M.P. No. 539 of 1966 along with the appellant compromising and withdrawing the suit. Therefore, the other defendants, who sailed with the plaintiff before the lower courts, are the contesting respondents before me. The suit properties belonged to the tarwad of the parties. The second defendant is the mother, the first defendant her eldest son by the first marriage, defendants 3 to 8 her children by the second marriage and defendants 9 to 13 the children of the eighth defendant. The first defendant brought O.S.No. 117 of 1955 for partition and separate possession of his share. Pending suit one of his brothers by name Narayanankutty died; and thereafter, a petition, Ex. D.3, was filed on 29th August

1956 compromising the suit. The plaintiff was shown as a minor in Ex. D.3. The plaintiff is said to have attained majority on 20th August 1956; and the case of the plaintiff was that since at the time of the compromise decree he was a major, the said decree would not bind him, as he was not shown as a major and he did not sign the compromise. The further contention of the plaintiff was that in the allotment of shares to the first defendant also there was inequity, because the first defendant was given a larger share and that even free from any liability for paying the tarwad debts. There was yet another contention that in compromising the suit the first defendant played fraud on the second defendant, the mother of the plaintiff, who was an illiterate woman, when she was in bereavement.

2. All these contentions were found by both the lower courts; and the lower courts decreed the suit.

3. The counsel of the appellant urges that C.M.P.No. 339 of 1966 might be allowed. He relies on O.XXIII R.1(1) of the CPC and contends that at any time after the institution of a suit the plaintiff is entitled to withdraw it or abandon part of his claim. In C.M.P. No. 339 of 1966, according to the counsel of the appellant, what is prayed for is only such a withdrawal of the suit. It is pointed out by the other side that the suit being one for setting aside an earlier partition and for a re-partition, O.XXIII R.1(1) will not apply. It is a well established rule that in a partition suit a defendant who is entitled to a share is also in the position of the plaintiff, so that, it the plaintiff withdraws the suit, any such defendant may continue it. The counsel of the appellant then argues that this is not a pure suit for partition, but is a suit in the first instance for setting aside an earlier partition and only at the second instance a suit for re-partition. I do not think that even this can help the appellant, because the contesting defendant-respondents, who were themselves minors at the time of the compromise partition decree, could have brought a suit of the same nature to set aside the compromise decree and for re-partition. In such a case if the plaintiff who brought the suit withdraws, the other parties who have the same right must be allowed to continue the suit. Therefore, C.M.P. No. 339 of 1966 has to be dismissed and is dismissed.

4. The main contention in the second appeal is that though the compromise decree was passed after the plaintiff attained majority, the compromise petition evidenced by Ex. D.3 was signed by the guardian of the plaintiff when the plaintiff was still a minor. Even according to the plaintiff, he attained majority only on 20th August 1956; and Ex. D.3 was signed on 2nd August 1956, The lower courts have followed two decisions, one of the Madras High Court and the other of the Mysore High Court. The Division Bench ruling of the Madras High Court is Lanka Sanyasi v. Lanka Yerran Naidu (A. I. R. 1928 Mad. 294). The ruling has laid down that where a minor who comes of age, if he does not come before court and get himself impleaded in the suit, will be presumed to have agreed to his guardian representing him, so that, if ultimately, the court passes a judgment after adjudication of the questions in the

case the judgment will bind him. But, the decision has laid down further that where a minor defendant attains majority during the pendency of a suit, a decree on compromise entered into after his attaining majority by his guardian, even if the compromise is sanctioned by the court, is not binding on him. This ruling has been followed by a Division Bench of the Mysore High Court in Kanjiah v. Marogowda (A. I. R. 1952 Mys. 134). But, Mr. M. K. Narayana Menon, the counsel of the appellant, draws my attention to the fact that in both the above cases the compromise petitions and the decrees passed on them were after the minors attained majority. In other words, the counsel contends that in the above cases the guardians had no authority to compromise even at the time when the compromise petitions were signed, because the minors were majors even on those dates. Basing on this distinction the counsel argues that in the case before me, at the time when the compromise petition was signed by the second defendant as guardian of the plaintiff, the plaintiff was still a minor, so that the subsequent passing of the decree by the court on the said compromise will not have the same result as laid down by the decisions of the Madras and the Mysore High Courts.

5. I do not think I can accede to this line of argument. The reasoning of the Madras High Court, which has been followed by the Mysore High Court, is that when an adjudication by the court on the merits of the controversy takes place, in the absence of any fraud, collusion or gross negligence, the adjudication should be binding on the parties to the suit, even if one of them was a major wrongly shown as a minor represented by a guardian; but, if the decision is based on a compromise, the capacity of the parties to the compromise to contract should be taken into consideration, and if one of the parties was not competent to contract as he was a minor, the compromise decree cannot have the same effect as a decree on adjudication. If this reasoning is to be applied to this case (and I have no doubt regarding its application), the same result must follow. By the mere signing of the compromise by the guardian the compromise does not become effective. The compromise becomes effective only when the court accepts it after being satisfied that the formalities required by law like the certificate of the counsel and the sanction of the court are complied with. In other words, the compromise becomes concluded only when the court passes a decree on the compromise. On this question another Division Bench ruling of the Madras High Court in Badapati Rajeswararao v. Puliveda Satyanarayana (A. I. R. 1946 Mad. 377) will furnish some light. In that case the Madras High Court was considering the question as to when sanction of court to compromise should be taken--whether before the compromise petition was signed or before the compromise decree was passed. Wadsworth J., who spoke for the Court, observed that the conclusion of the compromise came about when the compromise was made a decree of court; and that the guardian need not obtain sanction of court even before the proposals of compromise were settled and agreed to. It is thus apparent that the compromise petition is only provisional or only a proposal; and it becomes concluded only when the decree is

passed. Therefore, the point of time to be considered in a case like this is the time when the compromise decree is passed by the court and not when the compromise petition was signed. The result is that since the plaintiff was a major at the time of the compromise decree, the decree passed on the basis that he was still a minor cannot bind him.

6. I may now refer to a decision of the Lahore High Court which has also been brought to my notice by the counsel of the appellant. The decision is Ghulam Nabi v. Banheshar Mal (A. I. R. 1922 Lah.407), which lays down that a quondam minor cannot maintain a suit for a declaration that a decree passed against him on a compromise accepted on his behalf by his guardian ad litem with the consent of the court shall be of no effect on the ground that at the time of the compromise and decree the plaintiff had become sui juris and consequently was not represented before the court. No convincing reason is given by the learned Judge for coming to this conclusion. I may also add that this decision was cited before the Mysore High Court; and the Division Bench of the Mysore High Court did not follow this decision. It followed instead the Division Bench ruling of the Madras High Court already referred to. I am also inclined to disagree with the decision of the Lahore High Court.

7. Then it is urged by the Counsel of the appellant that the finding of the lower courts that the minor attained majority on 20th August 1956 is not correct. The argument is that the lower courts have based their conclusion on Ex.P.1 to P.3, Ex. P.1 the transfer certificate issued by a Government High School, Ex. P.2 the extract from the admission register of a private school and Ex. P.3 the Secondary School Leaving Certificate from the same government high school; and that that conclusion is wrong for the reason that Ex. P.2 is from a private school. In support of this contention two decisions of this Court have also been relied upon. I do not think that the position is correct. Firstly, there is no case for the appellant in his written statement that the date of birth mentioned by the plaintiff in his plaint was wrong. Secondly, even if Ex. P.2 is eschewed from consideration, Ex. P.3, the Secondary School Leaving Certificate issued by a government school, and Ex. P.1, the transfer certificate issued by the same government high school, are not liable to be rejected for the said reason. But, the counsel suggests that Ex. P.3 is merely a copy or a reproduction of Ex. P.2. There is no evidence that the date of birth mentioned in Ex. P.3 is based on the date of birth mentioned in Ex. P.2, the admission register of the private school. Therefore, this contention has also to be rejected.

8. Even if the partition is not liable to be set aside for the mere reason that the plaintiff was a major at the time of the compromise decree, the evidence in this case shows that the partition itself was not equitable. The appellant obtained 94 cents of land, whereas he will be entitled only to 48 cents on the basis of the extent of the properties belonging to the tarwad. The appellant''s share was free from debts, though admittedly the tarwad had debts. Ex. D.11 is a list prepared at the time of

the partition on the basis of the compromise decree showing the mesne profits of the several items. That also shows that even on the basis of mesne profits the appellant obtained a larger share than he was entitled to. Again, it has come out in the evidence that there were other debts as well for the tarwad, which were not included in O.S.No. 117 of 1955. Still further, the second defendant as Dw. 2 has stated that fraud was practised on her by the first defendant, when she was in bereavement as a result of which she signed the compromise petition. It has also come out that the compromise petition was written up on a previously signed paper, with the result that the appellant, who was a lawyer''s clerk, was able to incorporate recitals therein, which, in all probability, were not agreed to by the parties to the compromise. There is at least one provision in Ex. D.3, clause 9, which was not in the draft prepared and given by the lawyer. Admittedly, the appellant wrote the compromise petition and he put in clause 9 as well. It is pointed out by the counsel of the appellant that clause 9 does not give any advantage to the appellant. May not: still the fact remains that the appellant wrote the compromise petition on a paper previously signed by the parties. I may also point out that the evidence of Dw.2, the mother, that fraud was practised on her has been believed by both the lower courts. Therefore, even on merits the decree is liable to be set aside. I may add that I am aware that courts should not treat lightly a compromise accepted by court after satisfying the formalities required by law. But, there is no rule of law laying down that no compromise accepted by court can be avoided. The reasons enumerated by me in this paragraph are quite sufficient to avoid the compromise partition decree in this case,

9. Lastly it is urged that if the compromise decree is to be set aside, O.S.No. 117 of 1955 should be brought back to file and re-partition should be directed in that case. That is certainly the normal and proper cause to have been followed. But, I find that no such prayer has been made till now; and that re-partition has almost been completed in this case. Therefore, this prayer cannot also be allowed. The decision of the lower courts is thus correct; the same is confirmed; and the second appeal is dismissed with costs of the ninth respondent. I make it clear that since the plaintiff-respondent is a party to C.M.P.No. 339 of 1966, he is not entitled to costs.