
(1987) 05 KL CK 0012
In the High Court Of Kerala
Case No : A.S. No. 93 of 1979

A. Venkappa Bhatta and Others

APPELLANT

Vs

Gangamma and Others

RESPONDENT

Date of Decision : 26-05-1987

Acts Referred:

Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 115

Citation : AIR 1988 Ker 133

Hon'ble Judges : U.L. Bhat, J;Chettur Sankaran Nair, J

Bench : Division Bench

Advocate : K.P.V.B. Ejman, for the Appellant; Kunikullaya and P.V.V. Subramanian, for the Respondent

Final Decision : Dismissed

Judgement

Chettur Sankaran Nair, J.—This appeal by defendants 1, and 6 to 15 is directed against the judgment of the court below in a suit for partition. The parties are Havik Bramhins governed by the Hindu Mithakshara Law of inheritance. Their common ancestor Venkateshwara Bhatta had four sons, Shankaranarayana Bhatta alias Sankanna, husband of the plaintiff, D1, D2 and the husband of D15. The joint family divided itself into branches on 16-9-49 under Ext. B20. By this the plaintiffs husband and defendants separated from other branches and plaintiff A scheduled properties were allotted to this branch. B scheduled properties are said to be later acquisitions. Sankaranarayana Bhatta died on 1-7-1947. He had no sons, but only two daughters through the plaintiff. By reason of the Hindu Women's Right to Property Act, as adopted by Madras Act 26/1947, the plaintiff claimed a widow's estate, which later ripened into an absolute estate, u/s 14 of the Hindu Succession Act. The first defendant is the kirtha of the joint family. Defendants 3 to 5 are the sons of 2nd defendant. D15 is the widow of another brother and D6 to D14 are his children. The plaintiff claimed partition of 1/4th share of the estate, and share of profits. Defendants 1 to 6 created a sham partition deed Ext. B1 dt. 26-12-1970, she says. Her signature was obtained on

it, persuading her to think that it was document intended to avoid tax. Ext. B1 was registered at Puthur in Karnataka State and amounts to a fraud on registration and therefore cannot be treated as evidence of partition. The allotment of shares under Ext. B1 is also unequal and unjust. She also avers that B schedule property does not belong to the family.

2. The first defendant repudiated the claims of the plaintiff. According to him, Shankaranarayana Bhatta died long before Madras Act 26 of 1947 came into force, and therefore the plaintiff had no heritable right. He does not say when. Ext. B1 is a genuine document, the plaintiff was willing party to it, and B schedule also are family properties, according to him. He disputed all the averments of the plaintiff.

3. Defendants 2 to 5 would also contend that Shankaranarayana Bhatta died long before Madras Act 26/1947 came into force. They too, like the first defendant, would not say when. According to them, two suits are pending against the family, and they dispute joint possession of plaintiff after Shankaranarayana Bhatta's demise. The suit, they say, was inspired by the plaintiffs son-in-law. Defendants 6 to 15 would aver that there was only a maintenance arrangement in favour of the plaintiff, and after her death the properties set apart for her maintenance, were to devolve on her daughters. For the rest, they endorsed the contentions of other defendants.

4. The court below on the evidence of P. Ws. 1 and 3 found that the plaintiffs husband died on 1-7-1947, accepting Ext. A1 extract from the Register of Death as conclusive proof. The court found that she was entitled to 1/4th share of the family properties, and the profits claimed. Ext. B1 was found to be invalid and not intended to be acted upon; and B schedule property was found to be that of the 6th defendant (this is allotted to the share of the 6th defendant).

5. Relying on the evidence of P. Ws. 1 and 3, the court found that the plaintiff, an old and illiterate lady, entirely dependent on the first defendant was persuaded to subscribe her signature to Ext. B1, in the belief that it was to avoid tax. Ext. B1 was thus vitiated by undue influence and untrue representations. The evidence of the 6th defendant (as D.W. 1) that even after Ext. B1, the properties were managed as joint family properties, that "viniyogas" were conducted by him, that properties allotted to the plaintiff were less than her entitlement of 1/4th share (para 16), that no separate provision was made for "viniyoga", that it is to be performed by one sharer, in the house of another sharer, and other circumstances were noticed in support of the view that Ext. B1 was sham and intended as a cloak to disguise other intentions. The suit was decreed as prayed for, in consequence.

6. This is challenged in appeal by defendants 1, and 6 to 15.

7. The first question for determination is, when Shan karanaray and Bhatta died. Plaintiffs right of inheritance, would turn on the answer to this. When examined in 1977, she would say that her husband died 30 years ago, on "Navami" in

"Vrishabha" year. That is 1947 A.D. She is a simple and unsophisticated lady and her evidence has not been shaken by searching cross-examination. She has impressed us as a witness of truth and we have no hesitation to accept her evidence. The evidence of P.W. 1 regarding the date of death is not rebutted. The evidence of D.W.1 (the sixth defendant) who was only 10 years old in 1947, to the contra is not acceptable. The 1st defendant was not examined either. The evidence of P.W. 1 is corroborated by Ext A1. The date therein is 1-7-1947, We are inclined to accept. Ext. A1 also, not only because it is a public document but also because, the details therein and other circumstances fall in place, with plaintiff's case.

8. The appellants hotly contest her version -- contest for the sake of contest for they have no specific case in rebuttal, except elusive statements. If the date of death is long prior to 1947, the plaintiff would have no heritable right as the Hindu Women's Right to Property Act, as adopted by Madras Act 26/1947 would not be available. This seems to be the only reason, for the appellants to dispute the date. We reject the appellants' contention that plaintiffs husband died prior to the Madras Act 26/1947.

9. By operation of the Hindu Women's Right to Property Act, as adopted by the Madras Act, extending the Act to agricultural properties, plaintiff had a right in the properties of her late husband. It is argued by the defendants that even if the date of death is 1-7-47, the plaintiff would have no rights because the Act came into force only on 18-12-47. This argument must fail. The Act had retrospective effect from 26-11-46 as is clear from Section 3 thereof. In *L. Bappu Ayyar and Another Vs. Renganayaki and Others*,), we notice that the Madras High Court has taken a similar view. This right was perfected into an absolute estate. by operation of Section 14 of the Hindu Succession Act.

10. Appellants would then contend that in the face of Ext. B1 partition deed dated 26-12-1970. plaintiff is estopped from asking for partition over again, and in variance of Ext. B1. Incidentally, the appellants also urged that Ext. B1 is a maintenance arrangement, and no more. This argument is rested on the premise that the plaintiff has no heritable right and only a right of maintenance. In view of our answer to the question of her right, this contention must fail.

11. We next consider whether Ext. B1 operates to estop the plaintiff from claiming partition. We think not. According to plaintiff, Ext. B1 was the outcome of undue influence and mis-representation. Her evidence is that she subscribed her signature to Ext. B1 on the persuasion of first defendant, and on the assurance that it was a document intended to gain tax reliefs. Plaintiff, an old lady in late sixties and illiterate, not well versed in the ways of the world was leading the sheltered life of a widow in an orthodox family. She was very much under the influence of the first defendant, kartha of the family and brother of her late husband. She had no sons or support to look to. In this background, her version that she believed others and executed Ext. B1 is not only plausible, but appealing. We shall also notice the other relevant circumstances. D.W. 1 has

spoken to her case in detail. No doubt, she was unable to say who instructed the counsel to prepare the plaint. But, she knew what she was signing. D.W. 1 in an attempt to make out that Ext. B1 was a genuine document would say that the plaintiff read the draft of Ext. B1. It is a lengthy document containing complicated provisions. P.W. 1 is an illiterate person and we cannot accept the evidence of D.W. 1 that she read the draft of Ext. B1 or understood what it was. D.W. 2 supports the evidence of D.W. 1. Admittedly, he was not even on visiting terms with P.W. 1, though claims to be a mediator in the partition. We do not consider his evidence reliable. D. W. 3 who is a son-in-law of the plaintiff and the husband of the 12th respondent also supports the evidence of D.W. 1. He was not present when Ext. B1 was written and his evidence that all the executants read Ext. B1 before signing (including P.W. 1 who is illiterate) cannot be believed. The terms of Ext. B1 also is suggestive of the fact that it is only a sham document. It does not say which of the parties are entitled to which of the properties. The buildings have not been valued. The other recitals also are equally suspicious. It is recited that the plaintiff is incapable of cultivating the property and that she would get maintenance in lieu of her share. When she had two sons-in-law, grand children and daughters, we cannot accept these recitals for their face value. The clause that the 6th defendant would be in possession and that he would meet the expenses of the plaintiff as desired by her, is equally intriguing, more so when the plaintiff had informed him by registered notice of her intention to reside separately and had asked him to pay the amounts due to her, by the 31st of Mar. every year. Equally suspicious are the recitals that after a year of her death, the property must be given to the 6th defendant and the 12th and 13th respondents. The income of A schedule property is 8,55,150 arecanuts (about 25 candies), 280 murahs of paddy and 5490 coconuts. The plaintiffs share would be a fourth of this. It is difficult to think that a provision to pay her two candies of dried arecanuts is a fair settlement. It is nothing but unjust and inequitable. In these circumstances, it cannot be believed that she would have agreed to Ext. B1. Ext. B1 does not have the look of a partition deed, that makes fair and equitable allotment. The division is uneven. Plaintiff gets only 56 cents, and that too is in the possession of tenants. There are other suspicious circumstances, to which we have already made reference. Ext. B1 has thus a stage managed appearance. First defendant and the 6th defendant and their allies played a leading role to engineer Ext. B1 into existence. The venue for execution of Ext. B1 was chosen by them, at Puthur away from the place of their residence, and the residence of plaintiff. A convincing and palatable version for the execution of a document was given, namely to avoid tax. Chances are that she was carried away by what the first defendant told her, and little did she realise what was happening. Having regard to these circumstances, we are of opinion that Ext. B1 was not executed by plaintiff of her free will and that by untrue representations, which she was made to believe to be true, she was persuaded to join Ext. B1. This, to our mind appears to be a clear instance of undue influence. Lord Chelmsford stated the principle of undue influence thus in *Tate v. Williamsom*(1866) 2 Ch. App. 55 at 61).

"Wherever two persons stand in such a relation that while it continues, confidence is necessarily reposed by one, and the influence which necessarily grows out of that confidence is possessed by the other and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position, will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed"

Again in Allcard v. Skinner (1887) 36 Ch. D. 145 Lindley, LJ. stated the Law as follows :

"The undue influence which courts of equity endeavour to defeat is the undue influence of one person over another; not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external undue influence."

In Ladli Prasad Jaiswal Vs. Karnal Distillery Co. Ltd. and Others, the Supreme Court, noticed the principles of Common Law with approval :

"The Indian Enactment is founded substantially on the rules of English common Law.....a transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other."

12. Relying on Krishna Beharilal Vs. Gulabchand and Others, counsel for appellants urged that if a reversioner enters into a compromise with regard to his claims and the claims of his opponent, he cannot be allowed to go back on it. The court observed :

"It is well settled that a Hindu widow cannot enlarge her estate by entering into a compromise with third parties to the prejudice of the ultimate reversioners."

We do not think that plaintiff has entered into any such compromise.

13. The decision reported AIR 1937 274 (Privy Council) is apposite in the circumstances of the case, Lord Russell of Killowen stated the law in these terms:

".....the onus lay upon Upper Was saw to establish that the document had in fact been properly explained and interpreted so as to make the Omanhene of Acwin understand its real import."

Plaintiff as we have already stated is an illiterate person and she had no advice or means to know the contents of Ext. B1. There is no force in the contention that she was party to Ext. B1, and therefore that she is estopped from contending against it.

14. It is for the appellants to show that the plaintiff was made to understand the contents of Ext B1 and that she executed the deed, knowingly. The law is that it is up to the party relying on a document, executed by an illiterate person to

prove, that it was executed in the full knowledge of what it was, before such party can seek to enforce that. The bona fides and good faith on the part of the party seeking to enforce the document, must be proved. In AIR 1937 50 (Privy Council) , the Board observed :

"The burden of proving the good faith of the transaction is on the party who was in a position of active confidence."

As in the reported case, proof of good faith was not forthcoming from the defendants, particularly the 1st defendant, who was in a position to dominate the will of the plaintiff. We do not think that Ext. B1 would operate to estop plaintiff. The whole exercise, we think was an endeavour to deprive the plaintiff of her legitimate share.

15. The next question for consideration is whether there was fraud on Registration Laws. Whether B schedule property is divisible, will be material in considering this aspect. 2.88 acres of dry land belonging to one Narayana Naik was sold to the 6th defendant for Rs. 2,500/- on 4-11-70. On the same day he sold 3 acres for Rs. 20,000/- to P.W. 2. This is included in the share of 6th defendant in Ext. B1. On 3-12-71 this is sold by 6th defendant to P.W. 2 6th defendant admits that he purchased the properties after partition talks commenced and that he borrowed Rs. 2500/- in his personal capacity from one H.M. Bhat. P.W. 2 would say that he is in possession of the property, under the sale deed of 3-12-71 and that Narayana Naik was in possession prior to that. He would also say that the property for Rs. 20,000/- was purchased in his name and the other property for Rs. 2500/- in the name of 6th defendant. The purchase was thus really for P.W. 2 and not for 6th defendant or family. It is also clear that neither the 6th defendant nor the family was in possession. D. W. 1 says, he has no tax receipts with him. Thus, the acquisition in the name of 6th defendant was only a ruse. We are of opinion that Ext. B1 evidences, fraud on registration. A heavy stamp duty would be attracted in the case of property valued over Rs. 4 lakhs in Kerala. By bringing in B schedule properties situated in Karnataka into Ext. B1, registration was effected in Puthur in Karnataka, paying a stamp duty of only Rs. 90/-. This property was acquired by 6th defendant (it was allotted to 6th defendant). The acquisition was while the so called partition was round the corner even according to the defendants. It is very unlikely that the family would acquire an item of property at such a time. All these features show that it was not a genuine or bona fide transaction. In the light of Section 17(1)(b) and Section 47 of the Registration Act, the registration is not valid. The position would be as if the document is not registered It is unenforceable (see AIR 1934 157 (Privy Council) , AIR 1936 91 (Privy Council) and Karutha Syed Muhammad Rowthar Vs. Official Receiver and Another, . No evidentiary value can therefore be attached to Ext. B1.

16. We are satisfied that Ext. B1 was brought about by undue influence and misrepresentation, that it evidences fraud on registration and that it was not intended to be acted upon. The appellants have not succeeded, in showing that

the findings of the court below call interference.

17. In the result, we confirm the judgment and decree of the court below and dismiss the appeal. Parties will bear their costs.