

(1955) 08 KL CK 0008

In the High Court Of Kerala

Case No : Second Appeal No. 480 of 1953 in A.S. No. 66 of 1952

Couri Amma Vaidehi Amma

APPELLANT

Vs

Ranicswaran Pillai Miulhavan Pillai and Another

RESPONDENT

Date of Decision : 19-08-1955

Acts Referred:

Citation : (1955) 08 KL CK 0008

Hon'ble Judges : Varadaraja Iyengar, J

Bench : Single Bench

Advocate : K.P. Abraham, for the Appellant; K. Rama Iyer, for the Respondent

Judgement

Varadaraja Iyengar, J.—This second appeal is by the Defendants 1 to 3 and arises out of a suit for declaration that Ext. D sale-deed executed by the 1st Plaintiff in favour of the 1st Defendant was void and inoperative. The trial court dismissed the suit while the lower appellate court allowed it and hence this second appeal.

2. The 1st Plaintiff is the mother of the Defendant and mother's mother of the second Plaintiff. The common Tarwad of those parties had effected a partition in 1098 and the branch of the 1st Plaintiff and the 1st Defendant was again subdivided in 11.03 whereby the plaint properties items 1 to 9 were set apart to the 1st Plaintiff. The 1st Plaintiff had executed a hypothecation of other property belonging to the sub-Tarwad and covered by the partition deed of 1.103 but this transaction was being questioned by the 1st Defendant and other junior members.

According to the 1st Plaintiff apprehension was entertained that these hypothecates might file suit on the hypothecation bond and also levy attachment before judgment over the plaint items and therefore the 1st Plaintiff was persuaded by the 1st Defendant and others to execute a hypothecation bond in favour of her daughter the 1st Defendant. But as it happened the document was made to take the form of a sale-deed without the knowledge or consent of the 1st Plaintiff. Exhibit D was that sale-deed but it had not come into effect nor was

it intended to come into effect by the parties concerned.

Ext. D was retained in possession of the, 1st Plaintiff and the- properties also remained in her possession. At the time of Ext. D item 9 was in the posst of the 2nd Defendant as a mortgagee and the other items were enjoyed by the 1st Plaintiff through her lessees anil tenants. In respect of item 9 a suit O.S. No. 701 of 1117 had already been filed by the 2nd Plaintiff and others questioning the inclusion of item 9 in Ext. D and requiring redemption thereof from the 2nd Defendant. The suit was therefore laid for declaration that Ext, D sale-deed had not come into effect and was inoperative and could not affect the rights of the 1st or 2nd Plaintiff.

3. Defendants 1 and 2 filed separate written statements. According to the 1st Defendant her marriage took place in 1112 Medom after Ext. D date and till then and also for some time afterwards the 1st Plaintiff was managing her affairs. Ext. D sale-deed was executed for consideration and in good faith and the 1st Plaintiff was competent to execute the same. The original sale-deed was left with the 1st Plaintiff only for safe custody and had been taken hold of by the rest of the Plaintiffs subsequently when the 2nd Plaintiff went to her husband's house. There was no reason to impeach the sale-deed Ext, D and besides the suit was barred by limitation, having been filed more than 3 years after Ext. D date. The 2nd Defendant supported the 1st Defendant.

4. The main question for decision is whether the sale-deed Ext. D was a real sale and was intended to take effect. Ext. D purports to be a conveyance for a consideration of Rs. 196 which had boon advanced previously as gift to the 1st Defendant by her father, Pw. 2, to her mother the 1st Plaintiff and recital is made therein that this amount had been expended by the first Plaintiff on behalf of the Tarwad. But it is not stated in Ext. D when the amounts were obtained by the first Plaintiff or how the amounts were utilised on behalf of the Tarwad. Pw. 2, who is the best person to speak as to advance of the funds, denied that he had given any free gift or presents for the purpose of Ext. ID. Pw. 2 is the Kara-navan of a wealthy Namboodiri family and there is no reason to disbelieve his statement.

The first Defendant examined as Dw. 2 is "unable to give any details and is able to say only generally that she used to pay monies to her mother as and when she received gifts and presents from the father.

It would also appear that there was no necessity to spend any amount for the Tarwad by the 1st Plaintiff as recited in Ext. D in any event, for her to borrow from the 1st Defendant and clear off such-borrowing by sale f her property. The learned Munsiff thought that there was no strict proof by the Plaintiffs that the 1st Defendant had no source of money and that consideration has not passed. The learned Judge, on the other hand, found that Ext, J was not supported by consideration taking into account the evidence in the case of Pw. 2 and Dw. 2 and other circumstances. It seems to me that the conclusion of the learned

Judge has to be preferred to-that of the learned Munsiff.

5. The question next arising for consideration-is, was Ext. D intended to-take effect? As to this matter there is definite evidence in the case that the first Plaintiff had not given up possession. This is more or less admitted by the 1st Defendant who would say that the 1st Plaintiff was managing the property on her- behalf until she died. P. Ws, 3 and 4 who are the lessees speak to the rents having been paid to the 1st Plaintiff till her death and to the additional Plaintiffs thereafter. . It should be remembered that the 1st Defendant was 23 years at the date of Ext. D-and even according to her she was married soon after Ext. D in 1112.

There is no reason why it Ext. D was intended to take effect she should not have been given actual possession so as to take the profits for herself. All that the Munsiff is ably to say on the question is that; the evidence regarding possession was not against the first Defendant. It is clear, however, that Ext. D was-not followed by possession because it was not intended to take effect. The retention by the 1st Plaintiff of Ext. D original must be taken to prove beyond doubt that Ext. D did not also come into effect particularly in the light of another document produced in the case, viz., Ext. A hypothecation bond for Rs. 98 written on one rupee stamp paper on the same date as Ext. D but not registered.

It recites that it was executed in favour of the 1st Plaintiff by the 1st Defendant in respect of the self-same items of property for a consideration of Rs. 98 received earlier out of fund supplied by the very same Madhavan Namboodiri. It would appear as though Ext. A was executed in the first instance and Ext. D came in as a result of an after-thought. The learned Munsiff in his discussion as to the motive for the execution of Ext. D seems to think that there was no need to protect the properties of the .1st! Plaintiff at that stage by the execution of Ext. D.

It is unnecessary however to probe into the motive if we are otherwise clear that Ext. D came into existence in the way first Plaintiff has stated in her plaint and as now found. On the whole evidence I prefer to accept the conclusion of the learned Judge and therefore hold that Ext. ID was merely sham and nominal.

6. The next question for consideration is whether the suit is barred by limitation. The prayer of the Plaintiff is for declaration that Ext. D the sale deed is unsupported by consideration and is void. The trial court held that the suit was so framed with a view to evade the provisions of the Limitation Act and the real Article applicable was Article 78 of the Limitation Act of Travancore corresponding to Article 91 of the Indian Limitation Act. According to the trial court the first .Plaintiff knew of the contents of Ext, D and therefore of the facts entitling her to have the instrument cancelled or set aside on the very date of its registration viz., 2-11-1117, and the .suit having been filed more than three years thereafter, was clearly barred by limitation. The court below was also willing to apply Article 91 but held that the 1st Plaintiff's knowledge could be dated only to

1107 and the suit could not therefore be held to be barred. It seems to me that both the courts have misled themselves on the law as to the limitation applicable to the case.

7. Article 91 of the Indian Limitation Act runs thus:

To cancel or to set aside an instrument not otherwise provided for"

and the period prescribed is 3 years from the date when the facts entitling the Plaintiff to have the instrument cancelled or set aside become known to him. There can be no doubt that this Article is applicable only in cases where it is necessary to have the document set aside. Whether the document will have to be set aside or not for purpose of ensuring tire rights of the Plaintiff depends upon the principle of substantive Jaw and the distinction has always been maintained there between voidable documents on the one hand and void documents on the other.

Where the complaint of the Plaintiff for instance is that a document was obtained from her by fraudulent misrepresentation or that some terms in the; document are the result of fraud the document will necessarily have to be set aside, but if on the other hand it is said that the document was totally void because the Plaintiff did not understand the nature of the document or that the Plaintiff had not the real capacity to execute it the document need not be set aside for purpose of getting recovery of the property which might have gone into the possession of the I opposite party as a result of the transaction.

This distinction has been well brought out in the judgment of Justice T. L. Vonkalarama Iyer in Appanna Vs. Jami Venkatappadu and Others, . Learned Judge first referred to Pathcrpermal Chetty v. Muniandy Servai, ILR 35 Cal 551 (IS), where the question for determination was whether a suit to recover properties which had been transferred by a person benami in the name of another was governed by Article 91 of the Limitation Act and in holding that the Article had no application, the Privy Council observed:

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the Plaintiff's right to recover possession of his land and that it is unnecessary for him for to have it-set aside as a preliminary ,to his obtaining the relief he claims. The 144th, and not the 91st article in the second schedule to the Act is therefore that which applies to the case and the suit has consequently been instituted in time.

Learned Judge then referred to other cases: Mohammad Nazir and Another Vs. Mt. Zulaikha , and others which held that where the transaction is sham and nominal, there is no need to get it set aside and Article 91 has no application to such cases and continued.

Article 91 of the Limitation Act has no application where the instrument sought to be cancelled is void and inoperative as the article presupposes that a suit is

necessary under the law; to set aside the instrument. In the case of an invalid instrument which is void, there, is no need to the Court to set it aside and only voidable instruments require a decree of Court to set it aside. To such a suit tire period of limitation applicable is under Article .144 and not Article 91. If in such a suit there is a prayer for cancellation of the instrument it can only be regarded as ancillary to the substantive prayer for possession and can be treated as surplusage.

8. In the light of the finding I have arrived at that Ext. D was merely, sham and nominal, it follows that Article 91 cannot apply and as it is not contended that the suit is barred otherwise, it has to be held that no question of limitation arises in the case.

9. The second appeal fails and is dismissed with costs.