
(2009) 04 KL CK 0008

In the High Court Of Kerala

Case No : A.F.A. No's. 131, 160 and 161 of 1991

John and Others

APPELLANT

Vs

Elikutty and Others

RESPONDENT

Date of Decision : 08-04-2009

Acts Referred:

Arbitration Act, 1940 — Section 18, 34
Registration Act, 1908 — Section 17, 30, 31, 32, 33

Citation : (2009) 04 KL CK 0008

Hon'ble Judges : P.R. Raman, J;C.T. Ravikumar, J

Bench : Division Bench

Advocate : S. Venkatasubramonia Iyer, for the Appellant; S. Ananthasubramanian and S. Shyam for Respondents 1 to 4, C.K. Aravindakha Menon, K.C. Charles and T.B. Thankappan for 7th Respondent, for the Respondent

Final Decision : Dismissed

Judgement

C.T. Ravikumar, J.—These appeals are directed against the common judgment and decrec in A.S. Nos. 317 of 1990, 133 of 1990 and 316 of 1990 filed against the common judgment and decree dated 5-10-1983 in O.S. Nos. 263 of 1979, 326 of 1982 and 16 of 1981, on the file of the First Additional Sub Court, Ernakulam.

2. Before going into the factual details of these appeals, it is relevant to look into the background of the case. The lis in these cases centered around two ladies involved in the life of one Mathai Markose, viz., one Srrit. Sara and one Smt. Elikutty. The former is the estranged wife of the said Mathai Markose and she got five children in the said wedlock. He had an equal number of children through the latter with whom he lived the rest of his life after the former started separate residence. Mathai Markose died intestate on 30-9-1978 and naturally the dispute for his estate began thenceforth. Initially, the parties attempted to give a quietus to the dispute by making a private reference to certain Arbitrators who are the brothers and some close relatives of the deceased Mathai Markose, for effecting

partition of the properties left behind by him. For that purpose, the parties on either side, executed Ext. A-1 agreement dated 6-7-1978 agreeing to refer the issue to the Arbitrators named therein and further agreeing to abide by the award to be passed pursuant to such arbitration. Subsequently, the said Arbitrators passed Ext. X-1 award on 15-10-1978 and in pursuance thereof, the parties took possession of the respective shares allotted to them in the property left behind by the deceased Mathai Markose. However, the issue did not attain quietus and the parties began to raise disputes ignoring the award of the Arbitrators/mediators.

3. O.S. No. 263 of 1979 was filed by John, the son of deceased Mathai Markose through Smt. Sara and Smt. Sara, the widow. Smt. Elykutty and her children through the said Mathai Markose were the Defendants therein. It was a suit for recovery of possession of the plaint A schedule property therein with profits at the rate of Rs. 600 per annum. They had also filed O.S. No. 16 of 1981 which was a suit for an injunction against the Defendants, viz., Smt. Elykutty and her three elder daughters, from entering into plaint A schedule property therein and taking usufructs from there and also from disturbing their possession over the same. O.S. 326 of 1982 was then, filed by Smt. Elykutty and her children against Smt. Sara and her son Sri John as also against one Kunjan Neelakandan who was the tenant in item No. 1 of the plaint schedule property therein. It was a suit for declaration of their title and possession over the plaint schedule property and for an injunction restraining the Defendants from interfering with their and taking possession of the plaint schedule item No. 1 therein or collecting the rent from the third Defendant therein.

4. The following were the main issues framed by the trial court in the said suits:

O.S. No. 16 of 1981:

(i) Whether the Plaintiff was in possession of the plaint A schedule property on the date of the suit?

(ii) Reliefs and costs?

O.S. No. 263 of 1979:

(i) Whether the Defendants have any title and right to hold the plaint schedule properties?

(ii) Is there any arbitration agreement and award in respect of the plaint schedule properties as alleged in paragraph 8 of the written statement? If so, is it binding on the Plaintiffs?

(iii) Is not the Plaintiffs entitled to get recovery of the plaint schedule properties from the Defendants, together with mesne profits?

(iv) What is the mesne profits for which the Plaintiffs are entitled to, if the Defendants are liable?

(v) Regarding costs and other reliefs?.

(vi) Whether the trespass alleged is true?

(vii) Whether the Defendants are in possession of the properties in part performance of a contract?

(viii) Whether the Plaintiffs are estopped from claiming rights over the plaint schedule properties?

O.S. No. 326 of 1982:

(i) Whether there is a legal and valid arbitration "award" as alleged in the plaint? Whether it binds Defendants 1 and 2?

(ii) Whether Plaintiffs are in possession of the property in part performance of the award?

(iii) Whether Plaintiffs have title and possession for the plaint schedule properties?

(iv) Whether Plaintiffs are entitled to the declaration and injunction prayed for?

(v) Reliefs and costs?

(vi) Whether Defendants 1 and 2 have accepted the award? Whether they are estopped from claiming rights over properties allotted to the Plaintiffs as per the award?

All the three suits were jointly tried by consent of the parties. O.S. No. 326 of 1982 was treated as the main suit and evidence was recorded therein. In the common judgment, the trial court made reference of the parties in accordance with their ranks in O.S. No. 326 of 1982. P.Ws. 1 to 4 were examined and Exts. A-1 to A-6. were marked on the side of the, Plaintiffs. On the side of the Defendants, D.Ws. 1 and 2 were examined, but no documents were produced on their side. Ext. X-1 award dated 15-10-1978 passed by the Arbitrators/mediators and produced by P.W. 2 was marked as court exhibit.

5. The Arbitrators/mediators appointed on private reference passed Ext. X-1 award on 15-10-1978. making division and allotment of properties of deceased Mathai Markose between the first Plaintiff and her children and the second Defendant and her children. According to the Plaintiffs viz., Elikulty and her Children, the parties are in possession of respective properties allotted as. their shares and except one of the Arbitrators all the others have signed the said award and it was accepted in writmg by all the concerned parties inel ud ing the second Defendant (Smt. Sara) and her children and, therefore, the division and allotment oF the properties as per Ext. X-1 award are binding on all the parties. It is the case of the Plaintiffs that the plaint schedule properties were allotted to them as per Ext. X-1 award and that since then, they were in possession of the said properties. Item No. 1 therein is a shop room given on rental basis to the third Defendant and that ignoring the Ext. X-1 award, the Defendants have filed

O.S. Nos. 16 of 1981 and 263 of 1979 and another Succession O.P. in the Munsiff's Court, Muvattupuzha.

6. Defendants 1 and 2 in O.S. No. 326 of 1982 who were the Plaintiffs in O.S. Nos. 16 of 1981 and 263 of 1979, tiled a written statement contending that the first Plaintiff came to their residence as a maid servant while they were living with the deceased Mathai Markose. According to the second Defendant, the presence of the first Plaintiff in the family created an unpleasant situation as a result of which she was constrained to leave the house along with her children and that thereafter, they started living in Nilgiri. They also denied the alleged marriage between the deceased Mathai Markose and the first Plaintiff and also the factum of birth of Plaintiffs 2 to 6 as children in the lawful wedlock between them. They also contended that on the death of Mathai Markose, the ownership and possession of the properties left behind by him devolved on them and at that point of time, the Plaintiffs were not in possession of any portion of his properties. The factum of execution of an agreement for arbitration and the subsequent passing of the award and acceptance of the same were also denied by them. According to them, the Plaintiffs did not derive any right over the plaint schedule properties based on the award and that they alone are exclusively entitled to all the properties left behind by deceased Mathai Markose. Further, it is contended by the Defendants that they had permitted the Plaintiffs to reside temporarily in the building constructed in a portion of the plaint schedule property in item No. 2 and that taking advantage of this humanitarian act, the Plaintiffs trespassed into the nearby property which consequently led to the institution of O.S. Nos. 16 of 1981 and 263 of 1979. They had also denied the alleged rental agreement in the plaint schedule property and alleged that the plaintiffs were not entitled to any relief and sought for dismissal of the suit.

7. After a careful consideration of the entire matter, the trial court passed a common judgment in the said three suits, on 5-10-1983. A decree was passed in favour of the Plaintiffs in O.S. No. 326 of 1982. O.S. Nos. 16 of 1981 and 263 of 1979 were dismissed. The trial court arrived at the conclusion that the parties had entered into Ext. A-1 agreement and referred their disputes for a decision by the Arbitrators/mediators and further that the Arbitrators/mediators gave their decision vide Ext. X-1 award which was accepted by all the parties. It was also found by the trial court that in pursuance thereof, the parties had taken possession of the properties as per the provisions contained in Ext. X-1 award and that Ext. X-1 award is thus binding on all the parties. Therefore, they are not entitled to question the claim for possession by the Plaintiffs. It was based on the said conclusion that O.S. Nos. 16 of 1981 and 263 of 1979 were dismissed and O.S. No. 326 of 1982 was decreed declaring the Plaintiffs' possession over the plaint schedule properties and granting injunction against Defendants 1 and 2 from interfering with the Plaintiffs' possession and enjoyment of the property and also from evicting the third Defendant or realizing rent, arrears and future, from him from plaint item No. 1.

8. A.S. Nos. 133 of 1984, 316 of 1990 and 317 of 1990 were then filed against the judgments in the respective suits O.S. Nos. 326/82, 16/1981 and 263/79, viz., against the aforesaid common judgment and decree. All the three appeals were also heard jointly and a common judgment was passed in the said appeals by the learned Single Judge. As per the common judgment dated 6-6-1991, the learned Single Judge dismissed all the aforesaid three appeals. The learned Single Judge elaborately dealt with the evidence and contentions raised on behalf of the parties regarding the agreement for arbitration and also the award passed by the Arbitrators/mediators. The said common judgment would also reveal that before the learned Single Judge, no serious attempt was made to prove that the first Plaintiff was not the legally wedded wife of deceased Mathai Markose. However, none disputed that the Plaintiffs were living with deceased Mathai Markose at the time of his death. After appreciating the entire oral and documentary evidence and considering the various decisions relied on by both sides, the learned Single Judge arrived at the conclusion that Ext. A-1 agreement was produced to prove the agreement between the parties for division of the properties left behind by deceased Mathai Markose and Ext. X-1 was produced as a collateral evidence to prove the division of properties. It was held that in such circumstances, Ext. X-1 can be looked into for the limited purpose of ascertaining whether the division of properties alleged is true. It is a fact that in the other suits filed by Defendants 1 and 2, they have only set up a defence that there was a division of properties as a result of settlement by Arbitrators/mediators and that the parties have acted upon and accepted the mediation and most importantly, took possession of the respective shares allotted to them. In the circumstances, the learned Single Judge took the view that there is no bar in looking at Ext. X-1 as a collateral evidence to find out as to how the parties came into possession of their respective share of the properties. As stated earlier, after such careful consideration, the learned Single Judge dismissed A.S. Nos. 133 of 1984, 316 of 1990 and 317 of 1990 as per the common judgment dated 6-6-1994. These appeals are directed against the said common judgment of the learned Single Judge.

9. Before us, A.F.A. No. 160 of 1991 arising out of the judgment in A.S. No. 133 of 1984 i.e., the appeal against the judgment and decree in O.S. 326 of 1982, was taken as the leading case and arguments were advanced by both parties with reference to the status therein. Accordingly, hereinafter in this judgment, the parties will be referred to in accordance with their ranks in the said appeal. In this context, the following aspects also assume relevance. The first Appellant in A.S. Nos. 133 of 1984 and 317 of 1990 viz., Sri John was the sole Appellant in A.F.A. No. 160 of 1991 and A.F.A. No. 131 of 1991 and on his death, his legal representatives were impleaded as additional Appellants 2 to 5 as per order dated 27-1-2000 in C.M.P. Nos. 237, 238 and 239 of 2000 in A.F.A. No. 160 of 1991 and as additional Appellants 2 to 5 in A.F.A. No. 131 of 1991 as per order dated 21-1-2003. The same procedure was followed in A.F.A. No. 161 of 1991 also.

10. In all the three appeals, arguments were advanced on either side, recognizing Ext. A-1. as an agreement executed for division and allotment of shares in the properties left behind by the deceased Mathai Markose and Ext. X-1 as the award dated 15-10-1978 passed by the Arbitrators/mediators appointed by the parties pursuant to Ext. A-1 agreement. Based on such consideration, the Appellants mainly contended that Ext. X-1 award is not legally enforceable on various grounds. It was contended that Ext. X-1 was not written on a stamp paper and was not registered u/s 17 of the Registration Act and further that it was not made a rule of the court. It was also contended that one of the Arbitrators who was examined as D.W. 2 had not signed Ext. X-1 award based on the said aspects. The questions as to whether Ext. X-1 award is a compulsorily registrable one, the effect of its non-registration and whether the same can be enforced without making it a rule of court were also argued. The Respondents have raised arguments to sustain the award. In view of the rival contentions, mainly, the following points arise for our consideration:

- (i) Whether Ext. X-1 award is a compulsorily registrable one?
- (ii) What is the effect of its non-registration and whether the same can be enforced without making it a rule of court?
- (iii) Whether the Appellants are estopped from challenging the same based on the salutary doctrine of estoppel?

11. Admittedly, Ext. X-1 award was signed by all the Arbitrators/ mediators except D.W. 2, and the same was not written on a stamp paper. It was also not registered u/s 17 of the Registration Act. In such circumstances, the ancillary question regarding the effect of non-signing of the same by all the Arbitrators also invites our consideration. Before scanning the evidence and arriving at a decision, we think it preferable and profitable to look into the general legal position in regard to the validity of a document like Ext. X-1 award passed based on a private reference, the requirement or otherwise of its registration and the applicability of the doctrine of estoppel in such cases. To substantiate their respective contentions in relation to the aforesaid questions, the parties relied on various decisions of this Court and also the Honourable Apex Court. We are advertent only to those decisions which are relevant for the purpose of deciding the legal issues involved in these appeals.

12. On behalf of the Appellants, the decisions reported in Bhagwan Das and Ors. v. Girja Shanker and Anr. J.T. 2000 (Suppl. 1) S.C. 246, Delhi Auto and General Finance Private Limited Vs. Tax Recovery Officer, Income Tax and Others, , Pradeep Anand Vs. I.T.C. Ltd. and Others, , Lachhman Dass v. Ram Lal and Anr. (1989) 3 S.C.C. 99 and Satish Kumar and Others Vs. Surinder Kumar and Others, were relied on. In the decision reported in Bhagwan Das and Ors. v. Girja Shanker and Anr. J.T. 2000 (Suppl. 1) S.C. 246, the Appellant claimed exclusive possession of property on the basis of an unregistered partition deed and the Respondents therein claimed possession along with the Appellants/Plaintiffs. The

said unregistered partition deed was held to be inadmissible in evidence and the question was held in favour of the Defendants/Respondents. In appeal, the Honourable Apex Court held that since the document relied on by the Appellants therein was unregistered, it was rightly held by the High Court as inadmissible in evidence. In the decision reported in *Delhi Auto and General Finance Private Limited Vs. Tax Recovery Officer, Income Tax and Others*, the question was with respect to the effect of charge created pursuant to the Arbitrator's award and it was held therein that unless the award was made a rule of the court, such a charge will be ineffective. In *Pradeep Anand Vs. I.T.C. Ltd. and Others*, considering the provisions of Section 34 of the Arbitration Act, 1940, it was held that in case there is an arbitration agreement entered into between the parties, they should ordinarily be held by the agreement and they should not be permitted to initiate any legal proceedings other than the arbitration proceedings relating to any dispute coming within the arbitration clause. This position is also clear from the provisions u/s 18 of the Arbitration Act. The fact remains that no party will be entitled to get any benefit in any final award passed by the Arbitrator until the same is made rule of the court; and before this is done, the court is duty bound to give notice to the parties and consider the objections, if any raised by any of the parties against the award. In the decision reported in *Lachhman Dass v. Ram Lal and Anr.* (1989) 3 S.C.C. 99, it was held that for the purpose of registration of a document, Section 17 of the Registration Act has to be strictly construed and at the same time, it was held that the plea of invalidating the award on the ground of non-registration may not be open after the lapse of the prescribed period of limitation in an application under Sections 30 - 33 of the Registration Act. In the decision reported in *Satish Kumar and Others Vs. Surinder Kumar and Others*, a reference to arbitration was made by the parties without intervention of the court and the award was not made a rule of the court. Based on the private award, partition of immovable properties worth more than Rs. 100 was effected. Considering the question, the Honourable Apex Court held that registration of the award, before making it a rule of the court, is necessary. It was further held that the award is in fact a final adjudication of a Court of the parties' own choice, and until impeached upon sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted. As between the parties and their privies, an award is entitled to that respect which is due to judgment of court of last resort.... "The award does create rights in property, but those rights cannot be enforced until the award is made a decree of the court. It is one thing to say that a right is not created, it is an entirely different thing to say that the right created cannot be enforced without further steps." It was relying on the aforesaid decisions that the Appellants canvassed the position that Ext. X-1 award is a compulsorily registrable one and it cannot be acted upon on account of its nonregistration. Moreover, without making the award a rule of the court, it could not be enforced.

13. The Respondents relied on the decisions reported in *Roshan Singh v. Zile*

Singh AIR 1988 S.C. 881, Ram Charan Das Vs. Girjanandini Devi and Others, , Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., , B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others, , Bondar Singh and Others Vs. Nihal Singh and Others, , Kale and Others Vs. Deputy Director of Consolidation and Others, , 1968 Patna L.J.R. 218 and Thayyullathil Kunhikannan v. Thayyullathil Kalliani AIR 1990 Kerala 226 to resist the contentions of the Appellants and to canvass the point that non-registration of Ext., X-1 award and also the fact that it was not made a rule of the court would not and cannot make it impossible to be enforced and also that the Appellants are stopped from resiling from the agreement and also from challenging the legality of Ext. X-1. In the decision reported in Kashinathsa Yamosa Kabadi, etc. Vs. Narsinga Bhaskarsa Kabadi, etc., , the award of the court was accepted by the parties and subsequently ignoring such acceptance, a suit was instituted by one of the parties. Defence was set up on the basis of such acceptance. An award was passed by the Arbitrators regarding division of properties. In the circumstances, it was held that the award passed by the Arbitrators was not required to be registered u/s 17 of the Registration Act and that the partition thus effected based on the award dividing the family properties between the members of the family are binding on the parties. In the decision reported in Kale and Others Vs. Deputy Director of Consolidation and Others, it was held that the compromise need not require any registration. In Ram Charan Das Vs. Girjanandini Devi and Others, , it was held that the compromise between parties in a previous suit was family settlement and was binding on them and that every party who takes benefit under it need not necessarily be shown to have, under the law, a claim to a share in the property. All that is necessary to show is that the parties are related to each other in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground, as say affection. In the decision reported in Roshan Singh v. Zile Singh AIR 1988 S.C. 881, partition of ancestral properties was effected and there was a subsequent memorandum of partition embodying the factum of partition. It was held therein that the memorandum was only a family arrangement and its registration was not necessary. As stated earlier, arguments were advanced considering Ext. A-1 as the agreement between the parties and allotment of properties left behind by deceased Mathai Markose between the Appellants and the Respondents as per Ext. X-1 award passed by the Arbitrators/mediators in pursuance of Ext. A-1. The fact that the parties are in possession of the properties as allotted vide Ext. X-1 has also not been disputed. The fact that the grandmother viz., the first Plaintiff in O.S. No. 326 of 1979 was living with the deceased Mathai Markose as his wife and that her children who were the other Plaintiffs in the said suit were begotten through the said Mathai Markose also remains undisputed. The parties have also virtually admitted Ext. X-1 as the award passed in terms of Ext. A-1 agreement. Even otherwise Ext. X-1 will have a binding effect on all the parties as it can be taken as a family settlement. In both the cases, the facts borne out from the records and not put under dispute, are pointers to the fact that allotment of the properties of deceased Mathai Markose was effected between the parties and

that they are in possession of their allotted shares. In other words, the parties have already acted upon Ext. X-1 award and are in possession of their respective allotted shares. In the circumstances, the parties cannot dispute the existence of Ext. A-1 agreement and Ext. X-1 award dated 15-10-1978 as well as division of properties and allotment of shares. That being the case, the nature of Ext. X-1, whether it be an award or a family settlement, will not and cannot alter its binding effect between the parties and also it cannot have any adverse effect or impact on account of its non-registration. As held by the Honourable Apex Court, a party to such an award, after its acceptance, cannot be permitted to ignore the same, especially after division of the properties has been effected.

14. In this context, in view of the aforesaid admitted facts, the question of application of the doctrine of estoppel also assumes relevance. In the decision reported in *B.L. Sreedhar and Others Vs. K.M. Munireddy (Dead) and Others*, the Honourable Apex Court held that if by words or conduct, a person consents to an act, which could not lawfully have been done without such consent, and others are thereby led to do that which they otherwise would not have done, such person cannot be permitted to challenge the legality of the act he authorised, to the prejudice of others who have acted relying on the fair inference to be drawn from this conduct. Where rights are so involved, they are bound by the principle of estoppel. Estoppel may be described as a rule creating or defeating a right as well as a rule of evidence. In the decision reported in *Thayyullathil Kunhikannan v. Thayyullathil Kalliani* AIR 1990 Kerala 226, it was held that any arrangement tending to preservation of peace and security in a family is family arrangement, it is valid and binding on the members. The party taking advantage under such agreement is estopped from resiling from the said arrangement or trying to revoke it. The combined effect of the decisions mentioned above would be that the parties to the appeals cannot be permitted to challenge Ext. A-1 agreement and Ext. X-1 award. Ext. X-1 award, in the facts and circumstances of this case, cannot be said to be effected on account of nonregistration u/s 17 of the Registration Act or on account of the failure of the parties to make it a rule of the court. In short, Ext. X-1 award/settlement is binding on all the parties to the suit and their privies. Therefore, the parties are entitled to continue with their possession over the allotted properties in terms of Ext. X-1. Title to the said properties cannot be disputed or challenged by the parties or the beneficiaries of Ext. X-1. The parties are also estopped from challenging the validity of the award in the circumstances already expatiated.

15. Admittedly, there were ten Arbitrators appointed as per Ext. A-1 agreement. Ext. X-1 award was passed by the said ten Arbitrators effecting partition and allotment of properties that belonged to the deceased Mathai Markose. Admittedly, one of the Arbitrators who was examined as D.W. 2 did not sign Ext. X-1. He would, however, depose that he too had taken part in the arbitration proceedings and it was in pursuance of such a meeting that Ext. X-1 award was passed. In the circumstances, the mere fact that he had not signed Ext. X-1 award cannot invalidate the same. To buttress this point, learned Counsel for the

Respondents relied on the decision reported in 1968 Patna L.J.R. 218. In that case it was held that as party had taken part in proceedings before five arbitrators he was estopped from challenging validity of award on the ground that all arbitrators had not taken part in the proceedings. In such circumstances, the challenge of the Appellants against Ext. X-1 on the ground that it was not signed by one of the ten Arbitrators must fail.

16. The inevitable conclusion which should follow the above discussions is that Ext. X-1 award is binding on the parties and the Appellants are liable to fail in their attempt to assail Ext. A-1 agreement and Ext. X-1 award.

17. During the course of argument, a prayer was made that an injunction restraining the Defendants from entering into the properties allotted towards the share of the Appellants may be granted. Before the court below also, the predecessors of the Appellants had made such a prayer and the same was declined to be granted. There is no material before us to arrive at a finding that the Respondents herein are trying to encroach upon the properties of the Appellants which were allotted as their share based on Ext.X-1 award. In the absence of proper pleading to that effect and evidence in that regard, we are not persuaded to consider the said prayer.

In the result the appeals fail and they are accordingly dismissed. The parties shall bear their respective costs.