

(2008) 12 KL CK 0052

In the High Court Of Kerala

Case No : Regular Second Appeal No. 1129 of 2008

Mary George and Others

APPELLANT

Vs

Lilly and Others

RESPONDENT

Date of Decision : 09-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2008) 12 KL CK 0052

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : N. Subramaniam, M.S. Narayanan and P.T. Girijan, for the Appellant;
Zakeer Hussain, K.A. Sanjeetha, A. Balagopalan and A. Rajagopalan, for the Respondent

Judgement

V. Ramkumar, J.—Defendants 1 to 5 in O.S. No. 392 of 2005 on the file of the Sub Court, Ernakulam are the Appellants in this Second Appeal. The said suit was one for partition and separate possession of the Plaintiffs' 1/4th share over the plaint A and B schedule properties admeasuring 29 cents and 24 cents respectively after setting aside Ext. B-10 assignment deed dated 28-5-1953. The suit was originally filed before the Munsiff's Court, Ernakulam as O.S. No. 1320/2001 on 20-7-2001. Subsequently on 4-4-2005 it was returned for presentation before the Sub Court since the valuation exceeded the pecuniary jurisdiction of the Munsiff's Court. The plaint was thereafter presented before the Sub Court on 30-6-2005. The trial court dismissed the suit. But the lower appellate court reversed the decree passed by the trial court and passed a preliminary decree for partition allotting 1/6th share to the Plaintiffs. The lower appellate court also held that Ext. B-10 assignment deed is valid as against the share of the assignors but will not be binding as against the share of Plaintiffs and Defendants 6 to 8. Hence this Second Appeal by Defendants 1 to 5.

THE FACTUAL SETTING

2. One Anna who died on 30-9-1957 had two sons by name Vareed and Joseph.

Vareed died on 12-12-1935 and Joseph died on 8-11-1985. The wife of Vareed was one Rosa and the wife of Joseph was one Mariyakutty. Vareed had two sons by name Mathai and George @ Vareed. The said Mathai died on 18-11-1988 and George @ Vareed died on 27-12-1994. The first Plaintiff is the widow of Mathai and Plaintiffs 2 to 5 are his children. 6th Defendant is the widow of George @ Vareed and Defendants 7 and 8 are his children. Joseph the son of Anna had a son by name George who died on 15-4-1985. Defendants 1 to 5 are the children of the said George. George had two sisters by name Elizabeth and Mary.

3. The following is the genealogy showing the relationship between the parties and their predecessors:

Plaint A schedule property admeasuring 29 cents, the plaint B schedule property admeasuring 24 cents and Anr. property admeasuring 26 cents ail situated in Cheranellur Village of Ernakulam District were acquired by Anna and her two sons Vareed and Joseph as per Exts. A-1, A-2 and B-6 registered documents respectively all of the year 1109 M.E. corresponding to the year 1934. On 17-12-1124 M.E. corresponding to the year 1949 Anna and her son Joseph executed a registered document (Ext. B-9) possessory mortgaging the plaint A and B schedule properties to one Ouseppunni. This document executed in the year 1949 contains the following recital:

[Mathai and minor George who are the children of Vareed and their mother Rosa have been given in partition the 26 cents of property comprised in Survey No. 642/5 and those persons have no right over the properties scheduled hereunder or any other items and the mortgagee is given this assurance by the executants].

The first attestor to this usufructory mortgage deed is Mathai the then surviving major son of Vareed (S/o. Anna) who had already died in the year 1935. On the same day i.e. on 17-12-1124 M.E. Anna and Joseph executed a registered release deed releasing their rights over the 26 cents of land to Mathai and his minor brother George @ Vareed who were the children of Anna's son Vareed. Ouseppunni the mortgagee under Ext. B-9 is a witness to Ext. A-3 release deed under which a consideration of Rs. 200 was paid to the executees. Thereafter Anna and her son Joseph assigned their equity of redemption over the plaint A and B schedule properties to George, S/o. Joseph authorising him to redeem Ext. B-9 mortgage and pay a sum of Rs. 400 to his sister Elizabeth. Subsequently, as per Exts. B-11 and B-12 registered documents dated 27-11-1958 and 7-5-1974 George the assignee under Ext. B-10 redeemed Ext. B-9 mortgage. As evidenced by Ext. B-13 receipt George paid Rs. 400 to Elizabeth, his sister. As per Ext. B-3 assignment deed dated 28-12-1958, George sold 12 cents out of the plaint schedule properties to one Annamma who is in possession of the same. As per Ext. B-2 assignment deed dated 18-10-1985 George had sold 3.060 cents of property from the plaint schedule properties to one Surendran who put up a building there and is residing there. Ext. B-15 evidences that George had effected mutation of the registers in his name with regard to the balance extent of the plaint schedule properties. Exts. B-18 to B-26 evidence payment of land revenue

by George. The suit was filed in the year 2001 by the legal heirs of Mathai seeking 1/4th share over the plaint A and B schedule properties after setting aside Ext. B-10 assignment deed dated 28-5-1953.

4. Defendants 6 to 8 supported the Plaintiffs. The suit was resisted by the Appellants herein (Defendants 1 to 5) contending inter alia that in the year 1124 M.E. there was a partition among Anna, Joseph and the legal heirs of deceased Vareed as per which the legal heirs of deceased Vareed were given 26 cents acquired under Ext. B-6 assignment deed and that thereafter the said 26 cents was enjoyed by the legal heirs of Vareed and the plaint schedule properties were dealt with by Anna and Joseph who assigned their rights in favour of George, S/o. Joseph as per Ext. B-10 and that the rights, if any, of the legal heirs of Vareed over the plaint schedule properties were lost by adverse possession, limitation and ouster. The trial court as per judgment and decree dated 28-7-2007 accepted the defence plea of partition, upheld Ext. B-10 assignment in its entirety and held that plaint schedule properties which are the absolute properties of Defendants 1 to 5 are not available for partition. The suit was accordingly dismissed. On appeal preferred by the Plaintiffs as A.S. 203 of 2007 before the District Court, Ernakulam the learned Addl. District Judge as per judgment and decree dated 14-8-2008 held that since Ext. A-3 release deed is one for consideration of Rs. 200 it does not evidence a partition, that Exts. B-9 and A-3 are not between the same parties and therefore the principles governing the execution of documents by the same parties on the same day are not applicable, that Ext. B-9 mortgage does not take away the right of the Plaintiffs to seek partition as they were not parties to Ext. B-10 assignment after which the Plaintiffs had become co-owners in respect of the plaint schedule properties along with Defendants 6 to 8, that the Plaintiffs are entitled to a declaration with regard to Ext. B-10 assignment deed so far as their share is concerned, that attestation by Mathai in Ext. B-9 usufructory mortgage will not give him knowledge of the contents of the document and that the plea of adverse possession and ouster was not pressed by Defendants 1 to 5. Accordingly, the lower appellate court passed a preliminary decree for partition declaring that the Plaintiffs are jointly entitled to 1/6th shares and Defendants 6 to 8 are together entitled to 1/6th shares and Defendants 1 to 5 (who are the Appellants herein) are together entitled to 4/6th shares over the plaint A and B schedule properties. It is the said preliminary decree which is assailed in this second appeal by Defendants 1 to 5.

5. The Second Appeal was admitted on the following substantial questions of law:

(i) Even though generally an attester is not presumed to know the contents of the document, but if in a given case, where there is close relationship between the executants and the attester, cannot such attester be imputed with the knowledge of the contents of the document and cannot the possibilities of the attester having knowledge regarding the recitals in the documents and about the circumstances under which the document came to be executed be ruled out?

(ii) When a person, that too a close relation of the executants, attest a document, which is against his own interest, is not such an attester estopped from challenging the validity of said document?

(iii) Is not a release deed valid, not only when it is gratuitous but also when it is for consideration or some benefit accruing to the releasor simultaneously and can the releasee be allowed to later on turn round and say that he will only receive the benefits given under the document and that he is entitled to discard the disabilities incurred by virtue of that document?

(iv) In the light of averments in Ext. B-9 whether interpretation given by court below to Ext. A-3 read with Ext. B-9, is correct, more so when Ext. B-9 mentions about a past event recorded in Ext. A-3 of the same date?

(v) In the facts and circumstances of the case and taking into consideration the conduct of parties whether the judgment of the lower appellate court legally sustainable especially when the court below has failed to decide the case on the basis of preponderance of probabilities also?

6. I heard Advocate Sri N. Subramonian, the learned Counsel appearing for the Appellants and the learned Counsel appearing for the contesting Respondents who are the Plaintiffs and Defendants 6 to 8.

CONTENTION OF PLAINTIFFS (RESPONDENTS 1 TO 5) AND DEFENDANTS 6 TO 8 (RESPONDENTS 6 TO 8)

7. Learned Counsels appearing for the Plaintiffs and Defendants 6 to 8 made the following submissions before me in opposition of this Second Appeal:

The written statement filed by Defendants 1 to 5 does not plead an oral partition. Ext. A-3 release deed dated 17-12-1124 M.E. cannot be treated as a document evidencing any partition because it was a transfer for consideration. Ext. A-3 release deed does not contain any recital regarding the oral partition. Hence, it can only be treated as a conveyance. Since the heirs of Vareed were not parties to Ext. B-9 mortgage, the recital regarding partition contained in Ext. B-9 is not binding on them. With regard to the plaint A and B schedule properties, Vareed the elder son of Anna was also a co-owner. But Ext. B-9 usufructory mortgage was executed by Anna and Joseph alone. The recital in Ext. B-9 to the effect that 26 cents have been allotted in partition to the children of Vareed, cannot have the effect of depriving the children of Vareed their right over the plaint A and B schedule properties, particularly when the legal heirs of Vareed were not parties to Ext. B-9 mortgage. It is true that Mathai the elder son of Vareed was an attester to Ext. B-9 usufructary mortgage. But he cannot be imputed with knowledge of the contents of Ext. B-9 [Vide Ganesh Bhandary v. Ambunhi 1989 (2) KLT 882.] The Defendant examined as D.W. 1 has admitted that Ext. A-3 is a release deed obtained by the legal heirs of Vareed on payment of consideration. He has also admitted that Ext. A-3 release deed does not affect the rights of the legal heirs of Vareed over the plaint A and B schedule properties. The findings

recorded by the lower appellate court do not call for interference by this Court in exercise of the rarefied jurisdiction u/s 100 Code of Civil Procedure.

JUDICIAL EVALUATION

8. I am afraid that I cannot agree with the submissions made on behalf of the Plaintiffs. As already noted the plaint A schedule property admeasuring 29 cents, the plaint B schedule property admeasuring 24 cents and Anr. property admeasuring 26 cents all comprised in Cheranellur Village were acquired by Anna and her two sons Vareed and Joseph. The contention of the Plaintiffs that the Appellants (D-1 to D-5) did not plead in their written statement the partition in the family of Anna is absolutely incorrect. It is definitely pleaded in paragraph 2 of their written statement as follows:

Thereafter, a partition was effected among Smt. Anna and her son Joseph on the one part and the legal heirs of deceased Vareed, S/o Anna, viz. Rosa, Mathai and Vareed @ George on the other part. This partition was effected by executing a deed styled as a release deed but the effect of which was to effect a partition. As per this partition, Rosa and her sons Mathai and Vareed who were the predecessors in interest of the Plaintiffs and Defendants 6 to 8 obtained 26 cents of land in Sy. No. 642/5 of Cheranellur Village. The rest of the property was allotted to the share of Smt. Anna and Joseph. On the same day Smt. Anna and Joseph executed a mortgage deed in favour of one Ousepunni in respect of the property comprised of 29 cents in Sy. No. 643/9 and 24 cents in Sy. No. 643/1 in Cheranellur Village. Since, a partition had taken place among Smt. Anna and her children viz. Joseph and the legal heirs of her late son Vareed viz. Rosa, Mathai and Vareed @ George, the Plaintiffs and Defendants 6 to 8 cannot claim any right over the plaint schedule properties. They are not entitled to get any share in the plaint schedule properties.

Again in paragraph 9 of their written statement the Appellants had pleaded as follows:

There was a partition among Smt. Anna, her son Joseph and the legal heirs of Vareed. As per the said partition, the predecessors-in-interest of the Plaintiffs and Defendants 6 to 8, got 26 cents of property in Survey No. 642/5 as their share. Thereafter they had no right over the other properties and they are estopped from alleging that they are co-owners and in joint possession of the plaint schedule properties.

9. It was on 17-12-1124 M.E. that as per Ext. A-3 release deed the 26 cents of property comprised in Survey No. 642/5 of Cheranellur Village was given to Mathai and George who were the legal heirs of Vareed, the elder son of Anna. It is well-settled that as between co-owners there need not be a document executed as a partition deed for effecting a division of the co-ownership property. The intention to effect a partition as between co-owners can also be effectuated by two of the co-owners releasing their fractional rights in favour of the remaining co-owner in the form of a release deed. It must be remembered that

Ext. A-3 release deed was executed in the year 1949 at a time when no stamp duty was payable for release deeds, as well. It is not the nomenclature of the document or the language employed in the document that is decisive. What is more important is the actual character of the transaction and the nature of the rights created by means of the instrument. In the case of a transaction between co-owners with regard to the property under which those co-owners hold undivided shares and where there has been no partition by metes and bounds, the law is well-settled that there need not be a conveyance by one of the co-owners in favour of the other co-owners. Each co-owner in theory is entitled to enjoy the entire property in part and in whole. It is not, therefore, necessary for one of the co-owners to convey his interest to the other co-owners. It is sufficient if he releases his interest. The result of such a release would be enlargement of the share of the other co-owners. [See Board of Revenue and Another Vs. V.M. Murugesu Mudaliar of Gudiyatham,]. No doubt, Ext. A-3 release deed in this case recites payment of a sum of Rs. 200 as consideration to the executees. It is well-settled that a release deed can be validly executed also for some benefit accruing to the releasor simultaneously. A release deed is valid not only when it is gratuitous but also when it is executed for some benefit accruing to the releasor. [See P.D. Palanivelu Vs. The Sub Registrar, (District Registrar's Cadre), and Chief Controlling Revenue Authority, Referring Officer Vs. Rustorn Nusserwanji Patel,]. It is significant to note that after Ext. A-3 release deed the aforementioned 26 cents of property had been enjoyed by the legal heirs of Vareed to the exclusion of the Appellants. It is true that Ext. A-3 release deed does not recite any partition between Anna and her children. But then, on the same day, that is on 17-12-1124 M.E. Anna and Joseph, the other co-owners executed Ext. B-9 usufructory mortgage in respect of both the plaint A and B schedule properties (53 cents) in favour of Ousepunni. It is in this document that we find the recital extracted hereinabove to the effect that Mathai and his minor brother George who are the children of Vareed and their mother Rosa have been given in partition the aforesaid 26 cents of land and that they have, therefore, no rights over the plaint A and B schedule properties. When two or more documents are executed on the same day, all those documents are to be read together to know the real intention of the parties [See Pailoth v. Kunjuvareed 1986 KLT 1390, Prabhakaran v. Anthappan 1986 KLT 58 Case No. 95 and Mushir Mohammed Khan (Dead) By LRS. Vs. Smt. Sajeda Bano and Others, .] The so-called admission of D.W.1 from the witness-box cannot be decisive, for, it is well-settled that title cannot pass by admissions. It is the legal effect and subsequent conduct of the parties which are more relevant in deciding the issues.

10. Mathai (who along with his minor brother George @ Vareed got the 26 cents of land under Ext. A-3) is the first attester to Ext. B-9 usufructory mortgage. Now the question is whether Mathai who figured as an attester to the document containing the recital regarding the partition, could be imputed with knowledge of the contents of the document so as to be bound by or at least estopped from questioning the usufructory mortgage. The general proposition that an attester

to an instrument cannot ordinarily be presumed to know the contents of the instrument is unassailable. [Vide *Ganesh Bhandari v. Ambunhi* 1989 (2) KLT 882.] This is because an attestation of a deed of transfer proves no more than that the signature of the executant has been affixed to the document in the presence of the attesor and ordinarily it does not involve the attesor with the transaction nor does it afford him with notice of the transaction. [Vide *Banga Chandra Biswas v. Jagat Kishore Achariya Chowdhuri* AIR 1916 P.C. 110 and *Pandurang Krishnaji v. M. Thukaram and Ors.* AIR 1922 P.C. 20.] But then, the above proposition is not an inflexible rule which can be rigidly applied to all situations. There may be instances in which the person attesting the document may be one who is a close relative of the person entering into the transaction under the instrument. The degree of his relationship with any of the parties to the transaction may be so proximate that he cannot be expected to be insensitive to what is happening. It is inconceivable that a person standing in a near relationship with the executants to an instrument will agree to figure as a witness to the solemn act of attestation and lend his signature to the instrument mechanically without being inquisitive or atleast curious. There is profusion of case-law treating the attestation in such cases as tantamount to assent. The effect of a near relative witnessing a deed of conveyance was considered by the Calcutta High Court in *Matadeen Roy v. Mussodun Sing and Ors.* (1868) WR 293. The Hon''ble Sir Burnes Peacock, Chief Justice observed as follows:

When the Plaintiff put his name as a witness to his brother''s signature to a deed conveying the whole of the property, the court might reasonably infer that he knew that his brother was selling the whole of the property. If he knew that his brother was selling the whole of the property as his own and allowed him to do so without objection it would be evidence against him either that the whole property did belong to his brother, or that he was acquiescing in his brother''s act of selling the whole.

In *Narayana Aiyar v. Rama Aiyar* ILR Mad 396, Sadasiva Ayyar, J. speaking for the Division Bench observed as follows:

In the later case of *Vadrevu Banganayakamma v. Vadrevu Bulli Bamayya* [(1879) 5 C.L.R. 439 at page 447], the Privy Council approvingly say'' but it frequently occurs in native (Indian) documents that a man signs as a witness to show that he is acknowledging the instrument to be correct''. I may respectfully add that, in my pretty long experience as a Judicial Officer, if the attesor of the document has an existing interest in the property dealt with in the document, it has been always the case that this attestation has been taken in order to bind him as to the correctness of the recitals therein.

In *Ahemmadabad United Printing and General Agency Co. Limited v. Ardesir Cavasji* ILR 36 Bom 515 a Division Bench of the Bombay High Court speaking through Sir Basil Scott, Chief Justice observed as follows:

We have, however, the fact that he was an attesting witness. He was a

Government servant who must have understood the effect of the deed which he was attesting and which was executed by his brother who was in valivat of all the family properties.

The decisions of the Lahore High Court in AIR 1932 566 (Lahore) , of the Patna High Court in Bhagwat Rai Vs. Gorakh Rai and Others, , of the Nagpur High Court in AIR 1948 110 (Nagpur) and of the Madhya Bharat High Court in Abbasali Shah v. Muhammed Shah AIR 1951 M.P. 92 are also to the same effect. In State of Kerala Vs. Babu, a learned Single Judge of this Court observed as follows:

Attestor to a document cannot by mere attestation be imputed with the knowledge of the contents of the document. However, on the facts of a given case where there is a close relationship between the executant and the attestor such as husband and wife, father and son, the possibilities of the attestor having knowledge regarding the recitals in the documents and about the circumstances under which the document came to be executed cannot be ruled out.

The Apex Court had put on estoppel the conduct of a close relative attesting the document in Mahboob Sahab Vs. Syed Ismail and Others, . This is what the Supreme Court has observed:

Admittedly, the father continued to be in possession and enjoyment of the lands as owner as evidenced by the revenue records until it was mutated in the name of the Appellants to the extent of 16 acres purchased by him as per the aforesaid sale deeds Exts. D-1 and D-3. Ibrahim has attested Ext. D-1 when his father conveyed the lands as an owner. Though the sale was against his interest, he had not objected to the sale. He thereby, is estopped by conduct and record to assail Ext. D-1 sale or to claim any interest in the lands.

Thus, Mathai who had an interest in the property cannot be said to have attested Ext. B-9 mortgage containing the recital regarding the partition blissfully ignorant of what he was attesting. It is not for the court to question the wisdom or suspect the motives of a mother and her progeny at an undisputed point of time.

11. The arrangement conceived of by the mother and her descendants can be approached in Anr. way also. Ext. A-3 document can also be construed as a measure by way of family settlement. Members of a family can resolve prospective disputes through family settlement. [See Taraknath and Another Vs. Sushil Chandra Dey by Lrs. and Others, .] The concept of family settlement is not peculiar to Hindus alone but has been recognised among Christians also, [vide M.C. Chacko Vs. The State Bank of Travancore, Trivandrum, and A. Mariammal Vs. S. Sudalaikannu Thevar and Others,] It is a settled principle of law that no repudiation of a family arrangement is permissible. [Vide Krishna Beharilal Vs. Gulabchand and Others, .] A releasee cannot approbate and reprobate by electing to take the benefit thereunder but at the same time disapprove what is not beneficial to him. [Damodaran Kavirajan v. T.D. Rajappan ILR 1992 Ker 105.]

12. The subsequent conduct of the legal heirs of Vareed including Mathai and

Goerge @ Vareed and the Plaintiffs and Defendants 6 to 8 is also consistent with the arrangement between Anna and her descendants in the year 1949. While Mathai and George and their descendants retained with them the 26 cents of land given to them under Ext. A-3 to the exclusion of Anna, Joseph and his children, the other co-owners namely Anna and Joseph were exclusively dealing with the plaint schedule properties without sharing the same with the descendants of Vareed the other co-owner. It is 52 years after the family settlement that the Plaintiffs avariciously instituted the present suit laying a claim over the plaint schedule properties as well.

13. It is in evidence that after Ext. B-10 sale deed dated 28-5-1953 assigning the equity of redemption over the plaint schedule properties by Joseph and Anna to George S/o. Joseph, George who was the predecessor-in-interest of the Appellants had been dealing with the property as his own to the exclusion of the descendants of his paternal uncle Vareed and his descendants. He had even sold portions of the properties to strangers as evidenced by Exts. B3 sale deed dated 28-12-1958 and B-2 sale deed dated 18-10-1985. Those strangers are in possession of the respective portions of the suit properties and have constructed buildings thereon. The suit was filed as though the Plaintiffs are in joint possession along with Defendants 1 to 8 in respect of the entirety of the plaint schedule properties. There cannot be a partition of the property in the hands of strangers unless it is brought into the hotch-pot of the joint family or of the co-owners, as the case may be and ad valorem court fee on the value of the entire property in the possession of such strangers is paid for ejectment of those strangers. [Vide Sarojini Amma v. Pappiamma and Ors. 1973 KLT 148.] No such relief was prayed for nor was any court fee paid for such relief.

14. Incidentally, I wish to point that the Appellants had specifically pleaded that the rights, if any, of the Plaintiffs and the Defendants 6 to 8 over the suit properties were lost by adverse possession, limitation and ouster and additional issue No. 2 was also framed by the trial court in that behalf. The Appellants had adduced evidence also in support of the said issue. But both the Courts below disposed of that issue by holding that the said issue was not pressed by the Appellants herein. Nothing in writing was taken by the courts below either from the Appellants herein or from their counsel as enjoined by High Court Circular No. 28 of 1968. It is distressing to note that both the Courts below appear to have overlooked the said Circular as well as the decisions of this Court in Kannan v. Lakshmi 1970 K.L.T.731 and Kunnirickal Chitty Fund v. Narayanan Nair 1975 K.L.T.752. Fortunately, this Court has been able to dispose of this Second Appeal without going into the said question of adverse possession and ouster.

15. After a careful evaluation of the entire gamut of the pleadings and the evidence in this case, I have no hesitation to conclude that the suit which was rightly dismissed by the trial court was wrongly decreed by the lower appellate court. The Plaintiffs were not entitled to make a claim over the suit properties 52 years after the partition effected between the ancestors. They could not have

made a valid prayer for setting aside Ext. B-10 assignment deed of the year 1953 in a suit filed in the year 2001. The reasons given by the lower appellate court in support of the preliminary decree for partition passed by it, are unsustainable. The substantial questions of law are, accordingly, answered in the affirmative. The judgment and preliminary decree passed by the lower appellate Court, are set aside. I would have dismissed the suit in its entirety had it not been reported after the second appeal was posted for judgment that the parties have settled the matter by the Appellants ceding a portion of the suit properties to the contesting Respondents. Leaving it to the will of the parties, this Second Appeal is disposed of setting aside the appellate judgment and decree and laying down the legal position as aforesaid.

Dated this the 9th December 2008.