(1950) 11 KL CK 0010

In the High Court Of Kerala

Case No : A. S. No''s. 300 and 302 of 1119 and 148 of 1123

Oommen Poonnoose and Others APPELLANT

Vs

Koruthu Koruthu and Others RESPONDENT

Date of Decision : 13-11-1950

Acts Referred:
Shariat Act, 1937 — Section 36
Travancore Christian Guardianship Act, 1116 — Section 2, 5
Travancore High Court Act, 1099 — Section 11, 4

Citation : (1950) 11 KL CK 0010

Hon'ble Judges : Kunhi Raman, C.J;Subramania Iyer, J;Koshi, J

Bench : Full Bench

Advocate : N. Varadaraja Iyengar in No. 300 of 1119, V.G. Sankara Narnyana Pillai in No. 302 of 1119 and V.I. Joseph, in No. 148 of 1123, for the Appellant; P. Thomas and P. Sankaranarayana Kukkdaya in No. 300, for the Respondent

Final Decision : Dismissed

Judgement

Subramama lyer, J.—These three appeals arise out, of the decision of the Temporary Second Judge, Mavelikara, dated 17th Adi 1118 in O. S. 194 of 1116 on the file of the Dist. Ct. Mavelikara. A. S. Nos. 300 and 302 of 1119 are filed by drifts. 3 and 4 respectively, and A. S. No. 148 of 1123 is filed by the pliff.

2. The facts are these: The pltf. claimed partition and delivery of a 4/l3th share in the estate of his deceased father, Varki Koruthu who died on 1st Karkadakom 1105. Varki Koruthu had an elder brother Varki Mathai, who died in Chingom 1106 and whose widow was examined as P.W 1 in the case. He has a younger brother who is deft. 6 and who has been examined as D. W. 3. The 3 brothers had divided their partimony and had no longer any community of interest. Varki Koruthu had married thrice. The first wife died issueless. By the 2nd wife be had an only son Koruthu Varki, who died in Thulam 1106 leaving him surviving a widow and 2 minor children who are defts. 7, 8 and 9 respectively. After the death of the second wife he married a third through whom he begot 3 issues who

are deft. 10, pltf. and deft. 11. Varki Koruthu died leaving him surviving only his four children. His third wife would appear to have pre-deceased him. The three children of Varkki Koruthu by his third wife, who were all minors, were ever since the death of their father, under the care of P. W. 1. They continued to be under her care even at the time of the suit. Defendant 6 appears to have been a co-obligor with the deceased-Koruthu in certain transactions, one of which led to a decree in O. S. No. 353 of 1105, Munsiff''s Ct, Thiruvella. After Koruthu died and after his legal representatives were brought on record, deft. 6 appears to have been arrested in execution of the said decree and an amount of Rs. 30 appears to have been paid by him to obtain his temporary release from arrest. This happened in Kumbhom 1106 see Ex. XIII. Two mouths be-for this, i.e. on the 5th of Dhanu 1106 deft. 7 on her own behalf and as guardian of her minor children defts. 8 and 9 also as guardian of defts. 10, 11 and the pltf. who were all minors, then, executed a deed of hypothecation for Rs. 10,305 in favour of one Vargbese stating that from out of the consideration an amount of Rs. 1700 is adjusted towards the amount due to the hypothecatee, that an amount of Rs. 903 is made good by the hypothecatee paying the decree-holder in the said O. S. 353 of 1105 and reserving Rs. 7702 with the hypothecatee for payment of debts of the deceased Korathu specified therein. Exhibit VI is the deed of hypothecation. On 30th Medom 1106 a sale deed of the entire estate of deceased Koruthu, except 35 cents of land, was executed by the 6th (sic) as the guardian of pltf. and defts. 10 and 11 and by deft. 7 on her own behalf and as guardian of her minor children defts 8 and 9 in favour of deft. 1 for a consideration of Rs. 6501 made up of Rs. 1201 reserved for payment towards a liability under a chitty to be paid to the Travancore National and Quilon Bank Ltd., Rs. 8621/2 reserved for payment of another chitty liability in favour of the Modern Bank for both of which the deceased Korathu would appear to have executed deeds of hypothecation, and Rs. 4437-as. 8-0 paid in cash (so the document states) for discharging other unspecified debts of deceased Koruthu. On even date, the same parties executed a deed of hypothecation Ex. XIX in favour of the maternal uncle of the pltf. and defts 10 and 11 for Rs. 982 reserving Rs. 972 for payment of two specified debts incurred by deceased Koruthu under promissory notes and receiving Rs. 10 for the expense of the execution and registration of the document. On 27th Mithunam 1106, deft, 1 executed Ex. I in favour of deft. 9 stating that the aforesaid sale deed taken in his name was taken by and on behalf of deft. 2, that deft. 2 got possession of the properties pursuant thereto, that deft. 1 had no title to or interest in the properties the put-chase having been benami for deft. 2. Exhibit II refers to the earlier mtge. Ext. VI and states that on account of non-acceptance by the mtgee. the document did not come into operation. On 15th Karkadakom 1106 deft. 2 is seen to have pro-cured an endorsement marked Ex. VI (a) on Ex. VI by the mtgee. there under to the effect that the document was brought into existence without his knowledge and consent and that be had not accepted the same. On 24th Karkadakom 1106, deft. 2 sold the 4th item purchased by him under Ext. II in favour of deft. 4 by executing a deed of sale marked Ex. XVIII for a consideration of Rs. 1441 made up of Rs. 191 adjusted towards an amount stated to be due to the ven-dee from deceased Koruthu and receiving Rs. 1250 in cash. One Sankara Iyer obtained a decree against deft, 2 in O. S. 11 of 1108 on the file of the Dist. Ct. Alleppey, and in execution there of attached and sold the remaining items comprised in the sale deed Ex. II Sankara Iyer himself purchased the properties in Kanni 1110, took delivery of them through Ct. and entrusted them on lease with deft. 3 who is the son of deft. 2 and later on 4th Idavom 1111 sold the properties to deft. 3 for Rs. 1400. Exhibit X XlII is the sale deed. Defendant 3 gave a usufructuary mtge. of the properties thus obtained by him to deft. 5 for Rs. 3000 in Makaram 1112. Exhibit XXIV is the mtge. deed.

3. The suit was filed in the Dist. Ct. Kottayam on the 5th Meenom 1115 within three years of the pltf. attaining majority with an appln. for permission to sue in forma pauperis. It was Ptn. No. 22 of 1115. The case was afterwards transferred to the file of the Dist. Ct., Mavelikara, wherein the appln. for permission to sue in forma pauperis was numbered as 13 of 111(SIC) That appln. was duly enquired into and allowed by that Ct. and the suit was numbered as O. S. 194 of 1116 on its file.

4. The main relief claimed in the suit was partition and delivery to the pltf. of 4/ l3th of the properties left by the pltf''s. deceased father, Koruthu with mesne profits. Incidentally a relief by way of setting aside Exs. III, XVII, XXIII and XXIV was also asked for as documents executed by persons without authority, for no consideration, and as void so far as the pltf. is concerned. Defendants 3, 4 and 5 contested, upholding the transactions evidenced by the aforesaid documents which were claimed to be binding upon the pltf. as being executed by persons entitled to execute them and as being fully supported by consideration. Defendant 3 stated that the Travancore National and Quilon Bank Ltd., which was under liquidation at that time had obtained a decree for sale of some of the properties, that execution was proceeding and that the liquidator should be impleaded as a party to the suit. Accordingly the pltf. applied to implead the liquidator of the Travancore National and Quilon Bank Ltd., (in liquidation) and impeached the decree in O. S. 489 of 1111 obtained by the said Bank. The liquidator was impleaded as deft 12. Defendant 13 was also impleaded as a party interested but he does not seem to have any interest and does not come up for consideration in this case hereafter. Defendant 7 filed a written statement stating that Ex. II happened to be executed by her on account of misrepresentations made by defts. 2 and 6 and claiming her share in the properties. Defendant 11 by her written statement supported all the plaint allegations and claimed 1/13th share. Defendant 12 upheld the decree obtained by the Bank.

5. The lower Ct. has passed a decree in the following terms:

The originals of Exs. I and II and Exs. XVIII and XXIV are set aside so far as the pltf''s 4/13 share in the plaint properties is concerned, on the plt. depositing in Ct B. Rs. 1074-7 chs, that is 4/13th out of Rs. 3491-8chs-8 cash mentioned in para. 22 above. The amount deposited by the pltf. will be drawn by the defts. 4 and 5 in proportion to the extent of the consideration found above to have been advanced by them under Exs. XVIII and XXIV and to the extent of the properties of which they are to be deprived of by the pltf''s success in this suit. "The pltf''s 4/I3th share of the plaint properties will be recovered by him from the defts. 2 to 5 after the same is divided by metes and bounds by a Comr. to be appointed on the plt''s, appln. and after the deposit of the above mentioned B. Rs. 1074-7chs. The pltf. will apply for a commission on or before 24-1-1119. As there is no evidence about the amount of mesne profis and the defect is due to an issue not having been framed on the point, the question of the amount of mesne profits will be considered after the receipt of the Comr''s. report. This decree of course does not debar deft. 12 from pursuing his remedies in pursuance of his auction sale. Defendant 11''s 1/13 share will also be partitioned'' by metes and bounds on her paying the necessary court fees as mentioned above and depositing in Ct. 1/4 of the amount directed above to be deposited by the plt. such amount being also permitted to be drawn by defts. 4 and 5 in proportion as Indicated above. Defendants 8 and 9 are not entitled to claim any share as their mother deft. 7 executed Ex. II as their lawful and proper guardian. The pltf. will recover 4/13th of his costs of the suit in respect of the A valuation in the second amended plaint the entire costs in respect of B valuation and one-third of the costs in respect of the C valuation from the defts. 2 and 3 suffer his remaining costs. The defts. excepting deft. 12 will suffer their respective costs in the circumstances of this suit. Defendant 12 will recover one-fourth of his costs of the suit from the pltf. and suffer his remaining costs. The pltf. will be allowed to recover his share of the arrears of masne profits for 3 years before the date of the suit and of future mesne profits from defts. 2 to 5.

6. Appeals 300 and 302 by defts 3 and 4 are against that part of the decree which set aside the aforesaid documents. The pltf''s App. No. 148 relates to the direction contained in the decree for making a deposit in Ct. as aforesaid for getting his share of the properties. The applt. in A. S. 300 of 1119 filed C. M. P. 2901 of 1120 in this Ct. for admission of two fresh documents in evidence. They are (1) an order of the Travancore H. C. dated 7-11-1117 in C. M. P. 260 of 1117 which was an appeal against an order refusing to set aside the sale in O. S. 489 of 1111. The order runs as follows:

Heard both sides. The judgment-debtor''s (C. M. Applt) Counsel offers to deposit the sale amount in Ct. in two months from this date and prays that on that condition the sale may be set aside. This offer is accepted by the other side. Hence we order, that if the sale amount and interest there on at 6 % per annum from the date of sale is deposited in this Ct. within two months, the sale will stand set aside and that, in default of doing so, this appeal will stand dismissed with costs including counsel''s fee R. 15.

The other document is a communication from the Travancore H. C. intimating the fact o(SIC) deposit of the amounts pursuant to the direction contained in the said order. The parties do not object to reception of these documents in evidence. C.

M. P. 2901 of 1120 is allowed and the documents are marked as Exs. XXV and XXV (a).

7. The subject-matter of the appeals is thus confined to the claim to the pltf. for a 4/13 share of the properties which is of small value. The appeals, however, come up before a F. B. as provided by Section 11. (i) read with Exln. 1 Clause (b) of Clause (ii) of the said section of the Travancore High Court Act (Act IV [4] of 1099) as the aggregate value of the three appeals in not less than Rs. 5000. A similar provision is contained in Expln. 1 (b) of Act v. [(SIC)] of 1125 (United State of Travancore and Cochin High Court Act). The two questions that were raised in these appeals are these. Whether deft. 6 the uncle of the pltf. it defts. 10 and 11 was competent to grant the conveyance (Ex. II) and whether, even if he was not so competent, any relief could be granted to the alienee or his representative in this proceeding by way of repayment or otherwise of the consideration therefore.

8. It is the prerogative of the Crown (the state) as parens patrie to protect subjects who cannot protect themselves. Chartered H. Cts. in India as representatives of the Crown used to confer authority on persons as guardians of minors before the enactment of the Guardians and Wards Act which confers the power to appoint guardians on other Cts. as well. The personal law, if any, whether written as in the case of the Hindu and Muhammadan Law or unwritten as in the case of custom whether of a family, of a locality or of a community authorising particular persons to deal with the property of minors as guardians would be recognised except where even the proof of custom is prohibited as in the case of the Indian Shariat Act (XXXVI. [36] of 1937). Right to guardianship of the property of a minor must, therefore, be rested on an order of Ct. or on some personal law. A person deriving authority in this manner would be a de jure guardian. Quite recently the F. C. has considered the various aspects of the question of the guardianship of minors in AIR 1949 218 (Federal Court) and AIR 1949 218 (Federal Court) . Their Lordships point out that the expression "de facto guardian" which is often used is incorrect and the proper term to connote the idea would he.de facto manager. So far as the Christian community in the Travancore State is concerned, there does not appear to be any written personal law. Nor is any custom set up in this case. Sir Varadaraja Iyengar, the learned Counsel for the applts. in A. S. 300 however, contended that under the Travancore Christian Guardianship Act (II .[2] of 1116) a paternal uncle is a guardian de jure, that it is a declaratory Act and that therefore a paternal uncle must be regarded as having been a de jure guardian at all times in that State. He relies upon the preamble to the Act as also upon its statement of the objects and reasons. The preamble runs thus:

Whereas it is expedient to define and declare the law relating to guardianship as applicable to Indian Christians in Travancore, it is hereby-enacted as follows

We are not inclined to accept the argument. Except the existence of the word "declare" in the preamble, there is nothing to support it. The use of the word ''it is declared'' in a Statute does not necessarily import that the Statute is merely declaratory of existing law and therefore retrospective. The use of the expression ''it is declared'' to introduce new rules of law is not incorrect and is far from uncommon; Harding v. Queensland Stamps Commrs. 1698 A. C. 769 :67 L. J. P. C. 114. The objects and reasons of the Act to which attention was drawn by the learned Counsel show that

Custom in the community relating to the right of a person to act as guardian of a minor cannot be said to be uniform except in the case of and father.

If so what was the position of the paternal uncle before the Act? There was no uniform custom recognising the paternal uncle or for that matter any other relation than the father as guardian. Again, Section 5, Clause (c) of the Act saves transactions which were good before the Act from being hit by its provisions i. e., contemplates cases where persons other than those recognised as guardians by the Act may have acted as guardians and such acts may have been good according to the law prevailing before the Act. Thus the Act is clearly non-declaratory in the sense contended for on behalf of the applt. It declares the law for that future. The Act is not retrospective.

9. Defendant 6 was, therefore, incompetent to convey the interests of the pltf. and defts. 10 and 11 as he purports to have done in Ex. II. As to the nature of an alienation of a minor''s property by such unauthorised persons there was at one time a controversy and various views were held. One view was that it is void. Another view was that it is voidable, and a third was that the nature of the alienation would be in a state of suspense until it is rendered effective or otherwise according as the word accepts or rejects it after attaining majority. This controversy was set at rest by the P. C. in Imambandi v. Mutsaddi 45. I. A. 73 : 45 Cal. 878 : AIR 1918 P. C. 11, holding that such an alienation is absolutely void and the alienee if put in possession would be as trespasser. This decision has been followed by the Travancore H. C. ever since-See Uthuman v. Banas Gruse 1947 T. L. B. 103. However good may be the reasons for the alienation, even if it be for discharging debts unquestionably binding on the estate, the alienation would still be void if the person granting it has not the competency to convey-See Jan Muhammad v. Karamchand AIR 1947 P. C. 99 : I. L. B. (1947) Lah. 399. The question as to the character and adequacy of the consideration would arise only in a case where the transaction is entered into by a person having authority. The attempt of the applts. to sustain the alienation by deft. 6 is thus bound to fail. Exhibit II is void and the other documents, Exs. XVIII, XXIII and XXIV under which the applts. claim title are also void so far as the interests of the pltf. and deft. 11 are concerned. The lower Ct. has found that the transaction is binding upon deft. 10 who appears to have accepted the same after attaining majority. The pltf. is therefore entitled to a partition and delivery of 4/13 share of all the plaint properties with mesne profits as claimed by him. Defendant 11 is also entitled to the same relief in so far as her 1/13th share is concerned.

10. The nest question relates to the propriety of the direction that the pltf. and deft. 11 should Para proportionate share of the debts found by the lower Ct. Besides the amounts about which evidence was adduced in the trial Ct., the deposit made by deft. 3 for setting aside the sale of some of the properties in O. S. No. 489 of 1111 evidenced by EX. XXV series also come up for consideration in appeal.

11. The lower Ct. considered this question in Paras. 17 to 20 of its judgment: Except in respect of three items, viz., the decree debts in O. S. Nos. 1041, 1104, 353 of 1105 and the debt under a promissory note in favour of deft. 4, we concur with the conclusions come to by the lower Ct. after a consideration of the evidence in the case. It is unnecessary for us to reiterate the reasons for the conclusion. Suffice it to say that we agree with the grounds relied upon by the lower Ct. in arriving at its conclusions. The decree in O. S. No. 1041 of 1104 on the file of the Thiruvella Munsiff''s Ct. was obtained against the deceased Koruthu and his properties were under attachment therefore when he died (see Ex. XIV), Rs. 675 was paid to discharge that decree (see Ex. Ill, item 4). This is obviously a binding debt. As regards the decree in O. S. No. 853 of 1105, which was obtained against the deceased Koruthu as also deft. 6 we are not inclined to accept the testimony of deft. 6 to the effect that he was a surety and that the deceased Koruthu was the principal debtor. Defendant 6 appears to have been arrested in execution of that decree when he paid an amount of Rs. 30 towards the decree debt and obtained his temporary release. In the absence of evidence that deft. 6 was only a surety we have to take it that both the judgment-debtors were principal debtors and that, on that basis, they are bound in law, to share the liability equally. On that basis, the liability of the deceased Koruthu can be taken to be only one half of the entire decree debt. After the payment of the aforesaid Rs. 30, there was a balance of Rs. 752-chs. 8 cash 8. To this has to be added Rs. 30 paid by deft. 6 which would make a total of Rs. 792-chs. 8-cash 8. One half of this is the debt of the deceased Koruthu for which alone his estate can be made liable: We, therefore, reduce the liability on this item to Rs. 896-4-4 instead of Rs. 762-8-8 cash as found by the lower Ct. in Para. 19 of its judgment. The third item about which we take a view different from that of the lower Ct. is in respect of a debt due to deft.4 under a promissory note. The lower Ct. accepts the truth of this transaction, but reduces the claim for Rs. 191 in that behalf to Rs. 50 on the ground that deft. 6 swears that deft, 4 had agreed to settle her claim for Rs. 50 and that, as a matter of fact, only Rs. 50 was paid by deft. 2. Except the ipse dixit of deft, 6 which we are not inclined to accept, there, is nothing to support the case of reduction of the debt due to deft. 4 We find that Rs. 191 was due to deft. 4 by the deceased Koruthu and than that amount was adjusted and made good from out of the consideration for the assignment in favour of deft. 4. Exhibit XXV series produced by deft. 2 in appeal prove that the amount reserved in Ex. II for payment to the Travancore National and Quilon Bank, namely Rs. 1201 has been discharged subsequently though only after the decree and after the sale of the properties in execution thereof. The estate of the

deceased Korathu cannot be saddled with the extra liabilities arising on account of the suit and execution proceedings. The alinee can get credit only for the amount of Rs. 1201 reserved in that behalf in Ex. II. We direct that credit be given to deft. 2 and his representatives to the extent of Rs. 1201 in connection with the discharge of liability under a chitty hypothecation bond executed by the deceased Koruthu in favour of the Travancore National and Quilon Bank. The amount for which defts. 2, 3 and 4 are entitled to get credit on account of the consideration for Ex. II is the total of the amounts as found by the lower Ct. with the addition and alterations as shown above. The plf. will get his 4/13th share on payment into Ct. of 4/13th of the liability of the deceased Koruthu as aforesaid. Defendant 11 will also get her share only on payment of the proportionate liability as ascertained and fixed herein.

12. The suit is for partition wherein all the equities between the sharers and their alienees have to be adjusted. The alienation in question is one which is good in part and void only in respect of a part. The estate of the deceased Koruthu comprised properties alienated under Ex. II as also other properties not alienated. Some of the properties of the deceased Koruthu appear to have been attached in execution of decree obtained against him even during his life time. Some items were at his death subject to encumbrances created by him. Credit was claimed on behalf of the alienees on account of payments made pursuant to the assignment Ex. II. The plf. docs not appear to have objected to bearing a proportionate burden of the liabilities binding upon the estate of the deceased Koruthu, The controversy really related only as to what the binding debts are. This is the stand taken by the pltf. even in this Ct. Under all these circumstances, we are inclined to direct the pltf. and deft. 11 to bear the proportionate burden of the liabilities binding upon the estate of the deceased Koruthu whose properties form the subject-matter of this suit for partition.

13. In this view it is not necessary for us to consider nor have we considered the controversial question, as to whether in the case of an alienation of properties of a minor by an unauthorised person which is altogether void and the minor seeks recovery of possession of the properties from the alienee whether with or without a prayer for cancellation of the deed, a direction either as a condition or otherwise can be given by the Ct. for payment by the plf. to the alienee of any part of the consideration.

14. Dafendant 9 filed a memo of objections in A. S. 148 of 1123 and applied for permission to prosecute the same in forma pauperis. There are no grounds to allow the appln. to file and prosecute the same in forma pauperis. We indicated this at the hearing and the learned Counsel appearing for deft. 9 did not inform the Ct. that in the event of the appln. being disallowed, his client proposed to pay court-fee and that he required time to pay it. Under the circumstances the memo of objection should be dismissed.

15. In. the result A. S. Nos. 300. and 302 of 1119 and 1-18 of 1123 are dismissed with Costs and the decree of the lower Ct. is confirmed subject to the

modification which we have made in respect of the debts binding upon the estate of the deceased Koruthu, a proportionate share of which has to be borne by the pltf. and deft. 11. The pltf. is directed to pay the requisite court-fee to the State as he has been permitted to sue as also to appeal in forma pauperis.

Kunhi Raman, C.J.

16. I concur.

Koshi, J.

17. I agree.

