
(1890) 08 MAD CK 0005
In the Madras High Court

Unni and Another

APPELLANT

Vs

Kunchi amma and Others

RESPONDENT

Date of Decision : 26-08-1890

Acts Referred:

Limitation Act, 1963 — Article 91
Specific Relief Act, 1877 — Section 39

Citation : (1891) ILR (Mad) 26

Hon'ble Judges : Weir, J;Shephard, J

Bench : Division Bench

Judgement

1. This is an appeal against the decree of the District Judge dismissing a suit brought on behalf of a tarwad to recover property improperly

alienated by the late karnavan. The alienation, which was in the form of a demise on kanom, executed in favour of one Subban Patter, was made in

1879.

2. It has been held by the District Judge that, the suit being instituted more than three years after the date of the kanom, is barred by limitation,

because before recovering the property it was necessary to have the kanom set aside. It will be observed that the kanom document was not

executed by the plaintiff's or any person under whom they claim as heirs or otherwise.

3. There can be no doubt that when a person seeks to recover property against an instrument executed by himself or one under whom he claims,

he must first obtain the cancellation of the instrument, and that the three years" rule enacted by article 91 applies to any suit brought by such

person--Janki Kunwar v. Ajit Singh ILR 15 Cal. 58. In such cases, according to the old practice, it was necessary to have recourse to the Court

of Chancery, because at common law the claimant when met by his own deed was helpless. [Story's Equity Jurisprudence, cap. XVII; Davis v.

Duke of Marlborough 2 Swanston, 159.] It was only in the Court of Chancery that he could get the requisite relief. Although similar relief might be

given in cases where the deed was on the face of it void, on the principle of removing a cloud from the plaintiffs' title and preventing further

litigation, we do not think that relief by way of cancellation of the deed was absolutely necessary, except in cases where the deed was sought to be

avoided on account of fraud or other such ground. (See Story's Equity Jurisprudence, ib.) Provision is made for the two classes of cases above

indicated by Section 39 of the Specific Relief Act. In the present case the plaintiffs are seeking to recover property, alienated by their late

karnavan, and their case, with regard to the alienation, is that the karnavan was not, under the circumstances, authorized to make it. They have no

complaint to make of the manner in which the execution of the instrument was obtained by Subban Patter, but their charge is that the instrument

cannot have the legal operation which the appellants seek to give to it. In our opinion there is no distinction between this case and other cases

where a similar charge is made in respect of an instrument of alienation executed by a person who, not being the full owner of the property, has a

conditional authority only to dispose of it. Such are the cases of a guardian of a minor, the manager of a Hindu family or the sonless widow in a

divided Hindu family. In these cases, as was argued by the appellants' vakil, it is not only not necessary, but it is not possible, to have the

instrument of alienation cancelled and delivered up, because, as between the parties to it, it may be a perfectly valid instrument. All that is needed is

a declaration that the plaintiffs' interest is not affected by the instrument, and that declaration is merely ancillary to the relief which may be granted

by delivery of possession--Azim Unnissa Begum v. Clement Dale 6 M.H.C.R. 475. The question is really concluded by authority, for it has been

held in the case of the guardian, the manager of a Hindu family, and the Hindu widow wrongfully alienating property, that the suit which may be

brought to recover it is not governed by article 91 of the Limitation Act, Sikher Chund v. Dulputty Singh ILR 5 Cal. 370. In the case cited by the

District Judge, Raman v. Valia Amma S.A. 270 of 1880 not reported), which was a case similar to the present, Turner, C.J., and Keenan, J.,

observed:--""If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."" We entirely agree in this statement of the law. We do not think that the decision in Jagadamba Chowdhrani v. Dakhina Mohun L.R. 13 IndAp 84 has any bearing on the present case. In principle as well as on authority, we think that a prayer for the cancellation of the kanom document was not an essential part of the plaintiffs' relief and that, therefore, the suit being instituted within twelve years, was not barred by limitation. The result is that the decree must be reversed and the case remanded for disposal by the District Judge on the merits.

4. Costs will abide and follow the event.