

Krishnakumar Vs. Anandan and ors.

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Court : Kerala

Decided On : Jun-05-1993

Reported in : AIR1994Ker175

Judge : G. Rajasekharan, J.

Acts : [Trusts Act, 1882](#) - Sections 1 and 7

Appeal No. : A.S. No. 396 of 1989

Appellant : Krishnakumar

Respondent : Anandan and ors.

Advocate for Def. : V. Sankara Menon,; C. Chandrasekharan and A.K. Madhavan Unni, Advs.

Advocate for Pet/Ap. : K.N. Narayana Pillai and; B. Jayakumar, Advs.

Judgement :

G. Rajasekharan, J.

1. The first defendant in a suit for partition, is the appellant.
2. Plaintiff and defendants 1 to 3 are sons of one deceased Kumaranandan. Kumaranandan's father was Krishnanandan. In 1951, Krishnanandan and Kumaranandan together with the children then born to Kumaranandan, entered

into Ext. A 1 styling it a partition deed. As per that partition deed, it is seen that the properties which belonged to Krishnanandan, having obtained in an earlier partition between himself and his brother, and the properties acquired by Krishnanandan as well as Kumaranandan, were put together and division or settlement effected. Properties were divided into six schedules, and A schedule to E schedule were set apart to the different parties to the deed. The F schedule was not allotted to any particular individual, but with respect to Items 1 and 2 in F schedule, a Trust was created and Item No. 3 was left in common for the benefit of the entire family.

3. The plaintiff who was a minor at the time of Ext. A 1, has filed this suit for partition of the F schedule properties in Ext. A 1 among the children of Kumaranandan. According to the plaintiff, himself, the first defendant, their father and grandfather originally belonged to an undivided Hindu family, which got divided in 1951 as per Ext. A 1, that the properties covered by Ext. A 1 belonged to the family, and that F schedule properties to the partition deed were left in common, undivided. It is his further case that even though with respect to Item Nos. 1 and 2 of F schedule a trust was purported to have been created as per that document, such a trust could not be created by the executant, and those items also remain in common. In paragraph (4) of the plaint, it is averred that,

'even though the word 'trust' is used in the document, no such trust can be created by the executants of that partition deed.'

The reason given is that the creation of such a trust is against the provisions of Section 7(a) & (b) of the Indian [Trusts Act, 1882](#). It is further alleged that no trust with respect to Items Nos. 1 and 2 has ever come into being and now after the death of Krishnanandan and Kumaranandan, the first defendant as the eldest member, is managing the properties and they are liable to be divided among the plaintiff and defendants equally.

4. First defendant contended that with respect to F schedule Items 1 and 2 to Ext. A1. a valid trust has been created, that the trust had actually come into being, that it was being managed by Krishnanandan till his death, and that thereafter by Kumaranandan, and now the 1st defendant as the trustee, is managing the assets.

It is further contended that even though Ext. A1 is styled as a Partition Deed, actually it was not a partition deed, but only a settlement of properties by parties 1 and 2 to the Deed, who alone had right over the properties and so, Ext. A1 could only be construed as a settlement of properties by Krishnanandan and Kumaranandan to whom the properties belonged exclusively. On that premises, it is contended that since the minor parties to Ext. A1 had no right over the property, Section 7(a) and (b) of Indian Trusts Act had no application and the permission of the civil court was not necessary before creating the trust and the trust created by Krishnanandan and Kumaranandan, who were the absolute owners of the property, was valid. On these contentions, the 1st defendant has maintained that the plaintiff is not entitled to get the division of the suit properties.

5. Defendants 2 and 3 had filed a joint written statement, supporting the case of the plaintiff and claiming one-fourth share each.

6. The court below raised as many as nine issue as arising out of the pleadings. Issues 2, 3, 4 and 6, namely, are the suit properties liable to be partitioned? Is the trust created by document No. 1348/1951 mentioned in the plaint valid and whether it has come into operation? Whether plaint schedule properties are undivided properties as alleged in the plaint? and are the plaintiff and defendants 2 and 3 entitled to shares in the plaint schedule properties? we considered together by the lower court and it was held that the trust created in the Deed of 1951 is not valid, and that did not come into operation; that the plaint schedule properties are undivided properties belonging to plaintiff and defendants, and that plaintiff and defendants 2 and 3 are entitled to one-fourth share each. These findings are challenged in this Appeal.

7. In arriving at the above conclusion, in para (9) of the judgment, the trial court says:

'Admittedly at the time of the execution of Ext. A1, there are two minors. The plaintiff was one of the minors. So, as per Section 7 of the Indian Trusts Act the formation of the trust in Ext. A1 is void and it will not bind on the plaintiff, as the trust is formed in Ext. A1 on behalf of a minor, the plaintiff.'

8. The contention that the minors had no right in the property and so, Section 7 of the Indian Trusts Act had no application, was considered by the trial court in the following manner:--

'It is to be noted that even if the minors have no right in the property on the date of execution of Ext. A1 in view of Section 7(b) of the Indian Trusts Act that no trust can be created on behalf of the minor without obtaining the permission of a principal civil court of original jurisdiction, it has to be held that the creation of the trust in Ext. A1 is in violation of the provisions of the Trusts Act. So, it is invalid and it will not bind on the plaintiff.'

'I find that the creation of the alleged trust in Ext. A1 is void in the eye of law and it has not come into existence, affecting the rights of the plaintiff in Items 1 and 2 of F Schedule of Ext. A1.'

The trial court did not come to any specific finding as to whether at the time of execution of Ext. A1, the minors had right in the property or not. The reasoning of the Court below that 'even if the minors have no right in the property on the date of execution of Ext. A1, in view of Section 7(b) of the Indian Trusts Act, no trust can be created on behalf of the minor' etc. quoted above forgets what a Trust is. Section 3 of the Indian [Trusts Act, 1882](#) defines a 'trust' in the following terms:

'A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the Owner, or declared and accepted by him, for the benefit of another, or of another and the owner.'

When the trust is an obligation annexed to the ownership of property, that could be created only by the owner of the property. So, if actually the minors had no right over the property at the time of execution of Ext. A1, necessarily the trust purported to have been created, could not be on behalf of the minors. So, the question-whether the property actually was belonging to the family or it was the property which belonged to the parties 1 and 2 to Ext. A1, was relevant to be decided.

9. Even though Ext. A1 nomenclature is 'partition deed', it actually was not a partition deed, but only a settlement of properties belonging to parties 1 and 2, is clear from the document itself. The right to the properties covered by the Deed is traced to the Partition Deed, entered into between the 1st party and his brother, and acquisition made by parties 1 and 2. That statement in the document is sufficient enough to hold that parties 3 onwards had no pre-existing right in the property. But the document further says that ' (Vernacular matter omitted). '

Learned counsel for the plaintiff would place reliance on this passage and contend that the property was actually the property belonging to all the parties to Ext. A1. This contention cannot be accepted, the reason being that the document clearly mentions the source of right over the properties, and going by that, parties 1 and 2 are the absolute owners. The subsequent statement that the properties belong to all jointly, is made only to enable the registration of the document as a partition deed.

10. Clause 3 of Ext. A3 further would indicate that the intention of the parties 1 and 2 was to settle the properties to all, and parties 3 onwards had no pre-existing right over the properties. Clause (3) says that the 1st party had already given property to his daughters, excepting Sarada and with respect to those properties, Sale Deeds were being executed on the same date. To Sarada, it is stated, money was given. That would indicate that under the document the allotment of properties to parties 3 onwards was only as a settlement of properties as was done in favour of the daughters. So, the statement that the properties belonged to the parties in common and they are in joint possession and enjoyment, cannot be of any avail. No evidence is forthcoming to show that parties 3 onwards had any pre-existing right over the property.

11. The court below relying on Section 7(b) of the Indian Trusts Act, has held that the trust created with respect to properties listed as F Schedule to Ext. A1 is invalid for the reason that the trust was created on behalf of the minors also. The court below failed to consider the nature of trust created, and whether Section 7(b) has application at all, as regards the trust created under Ext. A1.

12. Under Section 1 of the Act, the Act 'extends to the whole of India except the State of Jammu and Kashmir, the Andaman and Nicobar Islands, but the Central Government may from time to time, by notification in the official Gazette, extend it to the Andaman and Nicobar Islands or to any part thereof.'

13. Savings to Section 1 is in the following terms;

'Savings -- But nothing herein contained affects the rules of Mohammadan Law as to Waqf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or, applies to public or private religious or charitable endowments, or to trusts to distribute prizes taken in war among the captors, and nothing in the Second Chapter of this Act applies to trusts created before the said day.'

So, public trust and private religious or charitable endowments are exempted from the mischief of the entire Statute. So, if actually the trust created under Ext. A1 is a public trust or a private religious or charitable endowment, Section 7(b) has no application.

14. A Division Bench of the Delhi High Court had occasion to consider the impact of Section 1 of the Indian Trusts Act in the decision reported in AIR 1982 Delhi 453, (Shrimati Shanti Devi v. State) and following a decision reported in AIR 1957 SC 133, the court held (at p 456 of AIR):

'The Act applies to private trusts only other than religious or charitable endowments. The most fundamental distinction private and public trusts depends upon the character of the person for whose benefit they are created. The essential difference is that in the former, the beneficiaries are defined and ascertained individuals or who within a definite time can be definitely ascertained, but in the latter the beneficial interest must be vested in an uncertain and fluctuating body of persons, either the public at large or some considerable portion of it answering a particular description.'

Clauses 5 and 8 are the relevant clauses in Ext. A1 relating to the creation of trust. Clause 5 says that Items 1 and 2 of F Schedule are set apart as a trust for

charitable purpose. It says: (Vernacular matter omitted)'.

In Clause 8 of the document, it is provided that Items 1 and 2 of F Schedule are set apart for '(Vernacular matter omitted)' 'and if necessary '(Vernacular matter omitted).'

It is nobody's case that the said class of persons are a defined and ascertainable number of individuals. They are an uncertain and fluctuating body of persons. So, what is created under Ext. A1 is a public trust. Further, the purpose is religious and charitable. Such a trust is saved under the Indian Trusts Act and Section 7(b) has no application. So, the finding of the trial court that the creation of the trust in Ext. A1 is hit by Section 7(b), is unsustainable. I have already held that the minors in Ext. A1 had no right over the properties covered by that document and for that reason also, Section 7(b) has no application.

15. The plaintiff has a case that even though the trust was purported to be created with respect to Items 1 and 2 of F Schedule to Ext. A1, it did not take effect. This contention is not supported by the oral evidence tendered by the plaintiff as PW 1. In cross-examination PW 1 says (Vernacular matter omitted).

The witness further says: '(Vernacular matter omitted)'.

At page 6 of the deposition, the witness says:-- '(Vernacular matter omitted)'.

In re-examination, an attempt was made to wriggle out of this admission and the witness was made to say that the expenses for birthday of 'Ananda Swamy' were not met from the income of the trust property. The father and grandfather while in possession of the F Schedule property to Ext. A1, were conducting or celebrating birthday and 'Samadhi' day of 'Ananda Swamy' and were offering charities. That fact admitted by PW 1 in the light of the provisions contained in Clauses 5 and 8 of Ext. A1, necessarily goes to show that the provisions in Ext. A1 creating trust with respect to Items 1 and 2 F Schedule, did actually come into effect and the trustees were performing charities in accordance with the provisions. The complaint of PW 1 throughout in the allegations in the plaint, is that the first defendant who is now managing the plaint schedule properties, is mismanaging the trust and he is

appropriating the income for his own benefit. That certainly is not in tune with the contention that the creation of the trust did not take effect. When that contention also goes, the trust created under Ext. A1 being a public trust for charitable purposes, is outside the purview of the Indian Trusts Act and Section 7(b) has no application in the matter. In the circumstances, the finding of the court below that the trust created with respect to Items 1 and 2 of F Schedule to Ext. A1, is hit by Section 7(b) of the Indian Trusts Act, is unsustainable and is set aside. It follows that Items 1 and 2 of the plaint schedule are not liable to be partitioned among the parties to the suit.

16. Item 3 of F Schedule to Ext. A1 was set apart in common, and no trust is created with respect to that property. That property is now in the hands of the first defendant and the plaintiff and defendants being sons of Kumaranandan are entitled to that item of property as their common or family property, and the plaintiff as well as defendants 2 and 3 are entitled to one-fourth share each and the remaining one-fourth share goes to first defendant.

17. In the circumstances, the Judgment and Decree of the trial court granting partition of Items 1 and 2 of F Schedule to Ext. A1, are unsustainable. That part of the preliminary decree is set aside. Plaintiff is entitled to one-fourth share in item 3 of F Schedule to Ext. A1. Defendants 2 and 3 each, on payment of necessary Court-fee, shall also be entitled to an equal share. As regards item Nos. 1 & 2 of F Schedule to Ext. A1, and in respect of other claims in the suit, the suit shall stand dismissed.

The Appeal is disposed of as above.

18. The preliminary decree is modified to the above extent. In the circumstances of the case, the parties are directed to bear their respective costs.