

Mahamood Vs. Ayissu and ors.

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Court : Kerala

Decided On : Feb-22-1957

Reported in : AIR1957Ker140

Judge : Kumara Pillai, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 6, Rule 17 - Order 23, Rule 3
- Order 32, Rule 7

Appeal No. : Second Appeal No. 959 of 1954 (M)

Appellant : Mahamood

Respondent : Ayissu and ors.

Advocate for Def. : V.P. Gopalan Nambiar, Adv.

Advocate for Pet/Ap. : K. Kuttikrishna Menon, Adv.

Judgement :

Kumara Pillai, J.

1. This second appeal arises out of a suit for partition. Plaintiff is the appellant, and the suit and the second appeal have been brought on his behalf by a next friend. There was a previous suit for partition brought on behalf of the plaintiff by defendant 2, his mother, as the next friend. That suit was settled out of court by

defendant 2 on behalf of the plaintiff, and Ext. B7 is the statement filed in that suit by the plaintiff's vakil regarding the settlement out of court, and Ext. B8 is the judgment dismissing the suit on account of the said settlement. In the present suit defendants 1 and 4 contended that the plaintiff was not entitled to get a share, that the suit was barred by reason of Ext. B8 and that they (i.e., defendants 1 and 4) were entitled to certain special rights. The courts below have concurrently found that the plaintiff is entitled to get a share and that defendants 1 and 4 are also entitled to the special rights claimed by them.

On the question of bar by reason of Ext B8, their findings were divergent, the trial court taking the view that as the compromise in Ext. B8 suit was effected without the leave of the court the said compromise and the decree based on it were void and not binding on the plaintiff and the suit was not therefore barred, and the lower appellate court taking the view that although the compromise was effected without the leave of the court the decree was not void but only voidable and that as the plaintiff has not asked in the present suit for setting aside Ext. B8 the suit is barred by reason of that decree and is not maintainable. As a result of this finding of the lower appellate court that court dismissed the suit, and so the plaintiff has come up in second appeal.

2. In view of the Supreme Court's decision in *Bishundeo v. Seogeni Rai*, AIR 1951 SC 280 (A), the appellant's counsel rightly conceded that Ext. B8 was not void and was only voidable. But the learned counsel contended that it was not necessary for the plaintiff to seek to set aside that decree and that he could avoid it in this suit. So long as the decree stands, which says that the plaintiff's claim for partition has been settled, it is not open to the plaintiff to make a fresh claim for partition. Therefore I am definitely of the view, that it was incumbent upon the plaintiff to include in the plaint a prayer for setting aside Ext. B8.

But having regard to the concurrent findings of the Courts below as to the plaintiff's right to get a partition I do not consider it just to penalise him with dismissing his suit for the omission to make this prayer. I consider that, in the interests of justice, an opportunity should be given to him to amend the plaint by including therein a prayer for setting aside Ex. B8. So far as the plaintiff's right to a share is

concerned, the question is concluded by the concurrent findings of the courts below. So also is the special right claimed by defendant 1. The special right claimed by defendant 4 appears to have been allowed mainly because of the compromise, Ex. B7. I would, therefore, direct that the question of the special right claimed by defendant 4 should also be decided afresh when the case goes back to the trial Court.

3. In the result, the Concurrent findings of the courts below regarding the plaintiff's right to claim a partition, the quantum of the share he is entitled to get, and the special right claimed by defendant 1 are confirmed; and the decrees of the courts below are set aside and the suit is remanded to the trial court for a fresh trial as regards all other questions involved in it and disposal after giving the plaintiff an opportunity to amend the plaint as indicated in this judgment. The second appeal is allowed as above, but in view of the plaintiff's omission to ask for an amendment of the plaint earlier he is directed to pay the costs of defendants 1 and 4 in the lower appellate court and in this court. The cost of the trial court will be provided for by that court in the new decree to be passed after the remand. The appellant is allowed to get a refund of the court fee paid on the memorandum of appeal in this court.