

Devaki Amma Vs. Raghavan Unnithan

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Court : Kerala

Decided On : Jul-21-1960

Reported in : AIR1961Ker224

Judge : M.S. Menon and; T.K. Joseph, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : A.S. No. 309 of 1956 (E)

Appellant : Devaki Amma

Respondent : Raghavan Unnithan

Advocate for Def. : T.K. Narayana Pillai (N) and; D. Narayanan Potti, Adv.

Advocate for Pet/Ap. : T.S. Krishnamoorthy Iyer, Adv.

Disposition : Appeal dismissed

Judgement :

M.S. Menon, J.

1. The 1st defendant in O. S. No. 3 of 1123 of the District Court of Mavelikara is the appellant before us. The suit was by the 1st respondent for the partition of the assets of one Krishna Pillai who died, according to the finding of the court below, on 12-1-1104.

2. The claim which has been decreed was for a three-fourth share in the assets of Krishna Pillai on the basis of Ext. A, a will alleged to have been executed by him on 9-1-1104. According to the 1st defendant the will was a fabrication and the whole of the properties devolved on her as per the direction in paragraph 9 of Ext. 1, the plaint of Krishna Pillai dated 8-1-1104 in pursuance of which the items concerned were allotted to his share in family partition.

3. The first question for consideration is whether the appellant is entitled to attack the genuineness and, binding character of the will or whether she is barred from doing so by the rule of res judicata in view of the contentions and decision in the suit which commenced by the presentation of Ext. 1. It is not disputed that if the will is genuine and operative or the appellant is precluded from contesting its genuineness and operative character, then, the 1st respondent is entitled to a three-fourth share in the assets of the deceased and that the decree of the lower court in that behalf has to be sustained.

4. Ext. I was originally filed by Krishna Pillai, in the District Court of Quilon and the suit was numbered in that court as O. S. No. 7 of 1104, It was subsequently transferred to the District Court of Mavelikara and numbered as O. S. No. 2 of 1118.

5. After the death of Krishna Pillai the 1st respondent and the appellant got themselves impleaded as additional plaintiffs 2 and 3 in that suit. The appellant was a minor at that time and the 1st respondent acted as per guardian, apparently in conformity with the provision to that effect in Ext. A. The suit ended in a decree in favour of Krishna Pillai, and by Ext. M dated 14-8-1120 the possession of Krishna Pillai's share was handed over to the 1st respondent on his own behalf and on behalf of the appellant.

6. The appellant became a major in 1105, and married the 2nd respondent on 7-8-1107. Ext. J, the judgment of the trial court in the suit instituted by Krishna Pillai for partition, and Ext. C, the judgment of the High Court of Travancore in the appeal therefrom, A. S. No. 37 of 1111, were both subsequent, to her attaining majority. Ext. J was delivered on 27-3-1110 and Ext. Con 26-1-1117.

7. The 2nd respondent was the 3rd defendant in the suit filed by Krishna Pillai. Ext U is a copy of the written statement filed by him in that case. In paragraph 4 of that written statement he specifically alleged that both the plaint and Ext. A were the creations of the 1st respondent and his father, and that they were of no effect. In Ext. II the replication filed by the 1st respondent on his own behalf and on behalf of the appellant, the allegation regarding the plaint and Ext. A was specifically denied: (the text in regional language is omitted.)

8. A matter may be res judicata between co-plaintiffs just as it may be res judicata between co-defendants. The conditions to be fulfilled are the same in both cases.

9. In Mahomed Saadat Ali Khan v. Wiquar Ati Beg, AIR 1943 PC 115 the Board following Munni Bibi v. Tirloki Nath, AIR 1931 PC 114 -- laid, down the conditions that must exist before a decision will operate as res judicata between co-defendants as follows :

- '1. There must be a conflict of interest between those co-defendants,
2. it must be necessary to decide the conflict in order to give the plaintiff the relief he claims, and
3. the question between the co-defendants must have been finally decided.'

In considering any question of res judicata we have also to bear in mind the statement of the Board in Sheoparsan Singh v. Ramnandan Prasad Narayan Singh, ILR 43 Cal 694 : (AIR 1910 PC 78) that the rule of res judicata 'while founded on ancient precedent, is dictated by a wisdom which is for all time,' and that the application of the rule by the courts 'should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.'

10. In Ram Bhaj v. Ahmad Said Akhtar Khan, AIR 1938 Lah 571 the court referred to ILR 43 Cal 694 : (AIR 1916 PC 78) and said :

'The raison d'etre of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest; and to allow persons who had deliberately chosen a position to reprobate it and to blow hot

now when they were blowing cold before would be completely to ignore the whole foundation of the rule.'

The judgment also referred with approval to Krishnan Nambiar v. Kannan, ILR 21 Mad 8. In the Madras case the defendant had sold to the plaintiff land of which he was not in possession and obtained the purchase money. Subsequently the plaintiff and the defendant together sued for recovery of possession but failed on the ground that the vendor had no title. The plaintiff then instituted the suit from which the appeal arose to recover with Interest the purchase money and the amount of costs incurred, by him in the previous litigation. The defendant sought to give evidence of his alleged title. The court held that he was not entitled to do so.

11. In the suit filed by Krishna Pillai both the appellant and the' 1st respondent invoked Ext. A.in support of their claim for the allotment to them of the share that would have been allotted to Krishna Pillai in case he had been alive. They succeeded in their attempt and it will be a curious state of affairs indeed if either of them is allowed to deny Ext. A and claim the spoils on the basis that) it was not operative.

12. In Chandu Lal v. Khalilur Rahaman, AIR 1950 PC 17 Lord Simonds referred to AIR 1931 PC 114 and said :

'It may be added that the doctrine may apply even though the party, against whom it is sought to enforce it, did not in the previous suit think fit to enter an appearance and contest the question. But to this the qualification must be added that, if such a party is to be bound by a previous judgment, it must be proved clearly that he had or must be deemed to have had notice that the relevant question was in issue and would have to be decided.'

The appellant, no doubt, was a minor at the time Ext. II was filed by the 1st respondent on his own and her behalf. Ext. P, a vakalath executed by her., and the 1st respondent after she attained majority and her own deposition in this case when examined as Dw. 5 clearly establish the fact that they made common cause and that she chose to adopt the contentions raised by the 1st respondent On her behalf.

13. It may be that the appellant was quite wise in basing her claim on Ext. A as she did rather than on paragraph 9 of the plaint filed by Krishna Pillai. Her status as the wife of Krishna Pillai was being challenged by the contesting defendants and it was risky to depend on that paragraph alone as it may not have operated as a will for want of attestation, or as a gift for want of registration. What we are concerned with, however, is not her prudence in adopting Ext. A but the fact that she did so, and that as a result she cannot now be permitted to reverse her case and challenge its validity.

14. The only other question that arises for consideration is the appellant's contention that there was an oral agreement between her and the 1st respondent to the effect that the whole of Krishna Pillai's share will be handed over to her and that that agreement was implemented by the delivery of the properties subsequent to Ext. M dated 14-8-1120. The contention is stated in paragraph 6 of her written statement and denied in paragraphs 6 and 7 of the 1st respondent's replication. Paragraph 7 of the replication deals with the transfer of possession as follows : (text given on regional language is omitted.)

15. Even the date of the oral agreement is not mentioned in the appellant's written statement. The oral evidence in support of it consists of the testimony of Dws. 1 to 4. The lower court discussed their evidence in detail and said :

'After very carefully reading the depositions of Dws. 1 to 4 I have no hesitation to observe that the testimony of these witnesses is artificial as well as highly unreliable. They are witnesses improvised for the occasion.'

We see no reason for a different conclusion.

18. The issue on the subject is issue No. 4 ;

'Whether the oral agreement set up by the 1st defendant is true? Whether 1st defendant was put in possession of plaint properties in pursuance of that agreement or whether 1st defendant got possession of plaint properties as alleged by plaintiff.'

There is a very full discussion of all the aspects bearing on this issue in paragraph 10 of the trial court judgment and in view of that we consider it unnecessary to go over the ground afresh. The conclusion embodied in that paragraph is :

'On a consideration of the evidence and circumstances in this case I hold that the case set up by the plaintiff is entitled to better credence than that of the defendants. I therefore hold that the oral agreement set up by the 1st defendant is not true. I also hold that the 1st defendant was not put in possession of the plaint properties in pursuance of the agreement set up by her. The defendants were put into possession of the plaint properties as alleged by the plaintiff. This issue is therefore found in favour of the plaintiff.'

17. In the light of what is stated above the other issues dealt with by the court below do not arise for consideration, and the appeal has to be dismissed and the decision of the trial court confirmed. Judgment accordingly. The appellant wilt pay the costs of the appeal to the 1st respondent.

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