

Phiroskhan Vs. Jabbar

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Court : Kerala

Decided On : Nov-05-2005

Reported in : 2006(1)KLT38

Judge : V. Ramkumar, J.

Acts : [Kerala Stamp Act, 1959](#) - Sections 4, 34, 34(2) 35, 41, 42 and 59 - Schedule - Articles 5, 21, 22, 43 and 48; Partnership Act - Sections 29(1) and 32; ;Code of Civil Procedure (CPC) - Sections 115 - Order 13, Rule 4; [Constitution of India](#) - Article 227; [Code of Criminal Procedure \(CrPC\) , 1898](#)

Appeal No. : W.P.(C) No. 27321 of 2005

Appellant : Phiroskhan

Respondent : Jabbar

Advocate for Def. : K.J. Kuriachan, Adv.

Advocate for Pet/Ap. : T. Krishnan Unni, Adv.

Disposition : Petition allowed

Judgement :

V. Ramkumar, J.

1. The interesting dispute which arises for resolution in this Writ Petition filed under Article 227 of the [Constitution of India](#) is as to whether Ext.P1 instrument dated 5-11-1997 whereunder one of the three partners of a registered partnership firm retired after receiving a sum of Rs. 1,00,000/- (Rupees one lakh only) is a mere agreement chargeable to stamp duty under Article 5(c) of the Schedule to the [Kerala Stamp Act, 1959](#) or whether it is a release deed chargeable to stamp duty under Article 48(b) of the Schedule to the said Act.

2. The stamp duty actually paid on Ext.P1 instrument is Rs. 200/-. If it is a mere agreement falling under Article 5(c) then the stamp duty payable for such agreement at the relevant time was Rs. 50/- and consequently, the instrument is properly stamped. If on the other hand, the instrument is a release falling under Article 48(b), then the stamp duty payable thereon would be the same as in the case of a conveyance falling under Articles 21 or 22, as the case may be. The stamp duty payable for a release deed for an amount of Rs. 1,00,000/- (Rupees one lakh) as set forth in the instrument, at the relevant time was Rs. 6,000/-, the rate of duty being 6%.

3. The petitioner in this Writ Petition is the plaintiff in O.S.5/1988 on the file of the Sub Court, Thodupuzha. The above suit is jointly tried along with O.S. 79/2003. The prayer in O.S. 5/98 is for a declaration that the amendment deed dated 5-11-1997 (Ext. P1 herein) amending the original partnership deed dated 30-3-1991 is null and void and for consequential injunction restraining defendants 1 and 2 (respondents 1 and 2 herein) from interfering with the management of the business of the firm on the basis of the amendment deed dated 5-11-1997. The prayer in O.S.79/03 instituted by the petitioner and the 3rd respondent herein is for a perpetual injunction restraining the defendant therein (the first respondent herein) from doing anything against the terms and conditions in the partnership deed dated 4-9-1995. Ext.P1 produced in this Writ Petition is alleged to be the said deed of amendment. When the said instrument was sought to be marked through D.W.1, the witness for the defendants, the marking of the document was objected to by the plaintiff on the ground that it is an insufficiently stamped instrument chargeable to stamp duty as a release deed under Article 48(b) read with Article 21 of the [Kerala Stamp Act, 1959](#) and that the instrument cannot be admitted in

evidence without the payment of stamp duty and penalty as provided under the proviso to Section 34 of the Kerala Stamp Act. The said objection was overruled by the learned subordinate Judge who as per Ext.P2 order dated 6-9-2005 held that the instrument is chargeable to stamp duty under Article 5(c) of the Kerala Stamp Act and therefore it is not an insufficiently stamped instrument and accordingly held that the said instrument produced by the defendants will be admitted in evidence and will be marked through D.W.1. It is said order which is assailed in this Writ Petition.

4. I heard the learned Counsel for the petitioner as well as the learned Counsel for the contesting respondents.

5. Adv. Sri. Kuriachan, the learned Counsel appearing for the contesting respondents raised a preliminary objection as to the maintainability of this Writ Petition contending inter-alia that in a case where an instrument has been admitted in evidence such admission of the instrument shall not, except as provided in Section 59 of the Kerala Stamp Act, be called in question at any stage of the suit or other proceeding on the ground that the instrument has not been duly stamped. This, accordingly to the learned Counsel is the mandate of the Kerala Stamp Act and if the case of the petitioner/plaintiff is that the instrument is liable to stamp duty at a higher rate as contended by him, his remedy is to move the appellate court under Section 59 of the Stamp Act and even in such a proceeding under Section 59 of the Act, while it is permissible to the appellate court to hold that the instrument is not an agreement as held by the trial court but instead, is a release and therefore, chargeable to higher stamp duty, the admission of the instrument in evidence by the trial court cannot be assailed at any stage of the suit or other proceeding including a proceeding under Section 59 of the Act. The argument is that Ext.P2 order passed by the trial court under Section 34 of the Stamp Act is a final order regarding admissibility of the instrument and Section 35 of the Act bars a challenge against such admission no matter whether the admission of the instrument is right or not. *Ettuthara Warriar v. Kochunarayana Menon* 1962 KLT 228 and *Javer Chand v. Pukhraj Surana* - : [1962]2SCR333 are relied on in this connection.

6. On the merits also the learned Counsel made the following submissions before me:

A reading of Article 43 of the Schedule of the Kerala Stamp Act will show that it contemplates payment of stamp duty only for an instrument of partnership and an instrument of dissolution of partnership. It does not envisage payment of stamp duty on an instrument of retirement of a partner from an existing partnership. Hence Ext.P1 instrument evidencing retirement of the plaintiff as the partner cannot be termed as a release since a release will necessarily involve a surrender or relinquishment of one's right over the property which means that there should be a transfer. It is well-known that during the subsistence of the partnership the right of a partner is to get his share of profits as may be agreed upon among the partners. A partner does not have a transferable interest in the movable or immovable properties of the firm. Hence a deed of retirement cannot be termed as a transfer in order to call it a release deed. (See Addanki Narayanappa and Anr. v. Bhaskara Krishnappa - AIR 1996 SC 1300 and Secretary, Board of Revenue v. Sankaranarayana Reddiar and Ors. 1981 KIT 586). A reading of Section 32(b) of the Partnership Act will show that an agreement alone is necessary for retirement of a partner. Hence Ext.P1 instrument is nothing but an agreement chargeable to stamp duty under Article 5(c) of the Kerala Stamp Act and not a release falling under Article 48(b) of the said Act.

7. I am afraid that I cannot agree both regarding the objection so to the maintainability of this Writ Petition as well as the submissions regarding the purport and legal effect of Ext.P1 instrument. I will first deal with the objection regarding the sustainability of the challenge against Ext.P2 order. Section 35 of the Kerala Stamp Act reads as follows:

Admission of Instrument when not to be questioned.-- Where an instrument has been admitted in evidence, such admission shall not, except as provided in Section 59 be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

A bare reading of the above provision itself indicates that the bar under the said section operates only where an instrument has been admitted in evidence. The

words 'admitted in evidence' occurring in the above section has a legal connotation. In the first place, a document can be said to have been admitted in evidence only after it is duly proved and marked and the necessary endorsement under Order 13 Rule 4 C.P.C has been affixed on such document. Here Ext.P2 order itself says that Ext.P1 instrument produced by the defendants will be admitted in evidence and will be marked through the first witness for the defendants that is D.W.1. Hence the bar under Section 35 is not attracted so as to foreclose a challenge against the admissibility in evidence of Ext.P1 instrument.

8. Section 59 of the Kerala Stamp Act reads as follows:--

59. Revision of certain decisions of Courts regarding the sufficiency of stamps.--

(1) When any Court in the exercise of its Civil or Revenue jurisdiction or any criminal court in any proceedings under Chap.XII or Chap. XXXVI of the Code of Criminal Procedure 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty under Section 34, the Court to which appeals lie from or references are made by, such first mentioned Court, may of its own motion or on the application of the Collector, take such order into consideration.

(2) If such court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under Section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instruments chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under Sub-section (2), the Court recording the same shall send a copy thereof to the Collector, and where the instrument to which it relates has been impounded or is otherwise in the possession of such Court, shall also send him such instrument.

(4) The Collector may there upon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under Section 41, or in Section 42, prosecute any person for any offence against the stamp-law which the Collector considers him to have committed in respect of such instrument:

Provided that -

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which according to the determination of such Court, was payable in respect of the instrument under Section 34, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purpose of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under Section 4.

A perusal of the said section indicates that even if an aggrieved party other than the Collector could invoke Section 59, the power under that provision can be exercised by the appellate court concerned only in a case where a court has passed an order admitting an instrument in evidence. In the instant case since Ext.P1 instrument has not been admitted in evidence, the question of invoking the power under Section 59 does not arise. The above provision enables the appellate court concerned either suo motu or on the application of the Collector to examine whether the instrument was or was not liable to be admitted in evidence without payment of stamp duty and penalty or without payment of a higher stamp duty and penalty. Even if the plaintiff were to invoke Section 59 of the Act and request the appellate court concerned to examine Ext.P2 order passed by the trial court, the appellate court cannot go into the illegality of the question as to whether the instrument was rightly admitted in evidence or not. All that the appellate court can do is to enter a finding that the instrument was of such a nature which attracted payment of stamp duty and penalty or payment of a higher stamp duty and penalty than what was paid on the instrument. Hence it is not open to the plaintiff to have recourse to Section 59 of the Stamp Act. Ext.P2 order is not revisable under

Section 115 C.P.C. either since even if the plaintiff's objection were to be sustained, it would not have finally disposed of the suit. I, therefore, do not find any force in the objection regarding the maintainability raised by the defendants.

Now coming to the merits of the case, in order to properly appreciate the rival contentions of the parties it will be useful to consider Ext.P1 document as a whole. Ext. P1 reads as follows:

This deed of amendment executed on the 5th day of November, 1997 between (1) A.H.Phirosekhan, aged 37 years, S/o. A.H. Hameed Rawther, residing at Anthinatt House, Thodupuzha, Idukki, (2) A.M. Jabbar, aged 52 years S/o. A.N. Hameed Rawther, Anthinattu House, Thodupuzha, now residing at Anthinattu House, Balussery, Calicut, (3) Sarammal Hameed, aged 77 years S/o. Late A.N. Hameed Rawther residing at Anthinattu House, Thodupuzha, Idukki and (4) Azeem Jabbar, aged 20 years S/o. A.H. Jabbar residing at Anthinattu House, Balaussery, Calicut as follows:

1. Whereas No. 1 to 3 above are partners of the registered firm namely 'Sarammal Hameed & Sons' and whereas that the above namely A.H. Phirosekhan offered his willingness to retire from the partnership business and it was accepted by other partners.
2. A.H. Phirosekhan retired from the firm with effect from the date mentioned above at his will.
3. It is mutually agreed that the accounts of the business as on the date will be audited and the retiring partner's dues if any will be settled within two months from this date.
4. Other than the monetary claims on settlement of accounts the retiring partner shall have no right or liability in respect of the firm.
5. In place of the retiring partner Sri. Azeem Jabbar, aged 20 years, S/o. A.H. Jabbar No. 4 above is inducted to the firm with effect from this date and he invested a sum of Rs. 1,00,000/- towards his share in the partnership firm. All the partners agree that No. 4 above shall have 40% share in the business of the firm

i.e. the share of the retiring partner.

6. The retiring partner received on this date a sum of Rs. 1,00,000/- ((Rupees one lakh) towards his claim subject to final settlement of accounts.

7. Phirosekhan named above is deemed to have been retired from the firm with effect from this date and Sri. Azeem Jabbar, S/o. Jabbar residing at Anthinattu House, Balussery, Calicut is inducted to the firm as on this date.

8. The second partner viz. A.H. Jabbar shall continue to be the Managing Partner of the firm. This deed of amendment shall be considered as part of the deed executed on 30th March 1991.

In witness where of all the persons above have put their signature on the date mentioned in the presence of the following witnesses:

1. H. Phirosekhan

2. H.R. Jabbar

3. Hameed.

Witness:

1 A.J. Mathew,

Chartered Accountant

Ayyaar & Cherian

Thodupuzha.

8. On the wording of Ext.P1 instrument there cannot be any doubt that it is one evidencing a release by a retiring partner in favour of the surviving partners. There cannot be any dispute regarding the concept of partnership. It is to embark upon a joint venture and for that purpose to bring as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought in the same. It would

be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought the asset into the partnership will not therefore be able to claim or exercise any exclusive right over such asset which he had brought into the partnership. He is not entitled to exercise his right even to the extent of his share in the business of the partnership. His only right during the subsistence of the partnership is to get his share of profits from time to time as may be agreed upon among the partners and after the dissolution of the partnership or upon his retirement from the partnership, of the value of his share in the net partnership assets as on the date of dissolution or retirement, as the case may be, after deduction of the liabilities and prior charges. It is true that even during the subsistence of the partnership a partner may assign his share to another. In that case what the assignee would get would only be that which is permitted by Section 29(1) of the Partnership Act, that is to say, the right to receive the share of profits of the assignor and accept the account of profits agreed to by the partners. In as much as a partner does not have any transferable interest in the movable or immovable properties of the firm, a deed of retirement of a partner cannot be a conveyance within the meaning of the Stamp Act. The amount which is paid to the retiring partner in lieu of all his claim, right, title and interest in the business and the assets of the firm till such time that the firm subsists, belongs to the firm. As in the case of co-owners, each partner in theory is entitled to enjoy the entire property of the firm in part and in whole. It is, therefore, not necessary for one of the partners to convey his interest in the partnership assets to the other partners. It will be sufficient if he releases his interest and the result of such release would be the enlargement of the share of the other partners. (See *Addanki Narayanappa and Anr. v. Bhaskara Krishnappa* : [1966]3SCR400 , (*Govind Das and Ors. v. The Board of Revenue* - AIR 1971 A11.540 (F.B.), *Addanki Naraayanaappa v. Bhaskara Krishnappa* AIR 1959 Madras 641 (FB), *T.T. Meenakshi Achi and Ors. v. The District Registrar, Coimbatore and Anr.* - : AIR1994 Mad317 and *Brothers Trading Syndicate v. Champalesseri Brothers* 1974 KLT 523.

9. In *Sankaranarayana Reddiar's case* - 1981 KLT 586 relied on by the learned Counsel for the respondents, the transaction in question was only an agreement recording a distribution of surplus assets of a firm after its dissolution. Such an

agreement does not involve a transfer and there was no consideration either paid. Hence that decision is clearly distinguishable.

In the light of the foregoing discussion, I am not inclined to accept the contentions of the respondents/defendants that Ext.P1 is only an agreement requiring stamp duty under Article 5(c) of the Kerala Stamp Act. On the contrary, it is a release chargeable to stamp duty under Article 48(b) of the Kerala Stamp Act. The stamp duty actually paid on the instrument is only Rs. 200/- as against Rs. 6,000/- and the deficit stamp duty and penalty payable thereon would be Rs. 63,800/- (i.e. 5,800 x 11). The court below shall admit the document in evidence only after payment by the defendants of the deficit stamp duty and penalty due under the document which shall be treated as a release. This Writ Petition is accordingly allowed and Ext.P2 order is set aside. Upon resumption of evidence, the court below shall dispose of the suit expeditiously. No costs.

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