

Rahamat Bibi Vs. Abdul Gaffur and ors.

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Court : Chennai

Decided On : Jan-20-1987

Reported in : AIR1988Mad150

Judge : V. Ramaswami and ;Sengottuvelan, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 32, Rule 2

Appeal No. : L.P.A. No. 82 of 1980

Appellant : Rahamat Bibi

Respondent : Abdul Gaffur and ors.

Advocate for Def. : R. Alagar, Adv.

Advocate for Pet/Ap. : G. Masilamani, Adv.

Judgement :

V. Ramaswami, J.

1. The suit property which is a house in Pondicherry belonged to one Haji Mohammed Ibrahim Saib. He had three wives. Defendants 1 to 4 are the children by his first wife. During the pendency of the suit, the first defendant died and his legal representatives have been brought on record as defendants 7 to 9. Through the second wife, the said Haji Mahamed Ibrahim Saib had three sons and two

daughters of whom the plaintiff is one of the daughters and defendants 5 is one of the sons. On 4-4-1956, the said Haji Mohammed Ibrahim Saib executed a gift deed in favour of two of his sons and two daughters, all of whom were minors at that time. Defendants 1 to 4 herein filed a suit Affair No. 289 of 1963 on the file of the Principal Sub-Judge, Pondicherry, for a declaration that the gift deed was not valid and for setting aside the same on various grounds. The four donees were made defendants in that suit. Three of them had already become majors. But the 4th defendant in that suit who is the plaintiff herein was a minor at the time when Affair No. 289 of '1963 was filed, she having been born on 25th Nov. 1949. In the plaint, this plaintiff was shown as being represented by the 6th defendant in the present suit. By judgment dt/-28-4-1967, the suit Affair No. 289 of 1963, was decreed as prayed for. However, it appears that the defendant was contending that she could not act or represent as the guardian of the minor and that she should be kept out from the suit. In the judgment the cause title shows that the minor the defendant was represented by Bailvun by alias Zograby. It is the same person who was shown as the guardian of the minor in the gift deed dt/- 4-4-1956. However, at the end of the judgment, it is stated that 'Exonerate from the suit the lady Bailvun by alias Zograby'. It is pointed out by the learned counsel for the respondents herein that the translation of that sentence from French as quoted above is not quite accurate and that it should read as keep out of the case the lady Bailvun by alias Zograby'. Be that as it may it is pertinent to point out that the decree itself is against all the four defendants and the decree declared that the gift deed dt/- 4-4-1956 is not valid and it was set aside and the first three defendants were, directed to pay cost of the suit. It is stated that as per the law that was in force in Pondicherry, an appeal may lie to the Superior Court of Appeal against this judgment and the period of limitation is thirty days from the date on which the judgment was notified. It is the admitted case that no such appeal was filed within that period prescribed. However, Special Appeal No. 702 of 1967 was filed in this Court against the judgment and decree by the defendants 2 to 4 in Affair No. 289 of 1967. By judgment Dt/- 1-8-1969 a Division Bench of this Court dismissed that appeal as not maintainable on the ground that the appellants had not preferred an appeal in the first instance before the Superior Court of Appeal. However, while disposing of the appeal, the Division Bench made the following observation :-

'The appeal is therefore dismissed on the preliminary ground. As observed already any remedy which the appellants will have under the law arising out of the alleged conduct of the co-defendant will not be affected by this decision.'

It may be mentioned that the conduct of the co-defendant who was alleged as giving the right to the other defendants, was the conduct of the first defendant who was the eldest brother of the other three defendants in the suit, in not conducting the suit on behalf of the other defendants properly and colluding with the plaintiffs. Thereafter, the plaintiff alone filed this suit though the other defendants 2 and 3 in the earlier suit also joined in filing of the appeal before this Court in Special Appeal No. 702 of 1967. In the present suit filed by the plaintiff which is numbered as O.S. 9 of 1972, the plaintiff has prayed for a decree setting aside the decree. in Affair No. 289 of 1963 as against the plaintiff and for a declaration that the suit house belongs to the plaintiff absolutely. In the plaint, the plaintiff has raised two substantial contentions. One -was that the 5th defendant herein -who was the eldest brother and the first defendant in the earlier suit, had in collusion with the plaintiffs in the earlier suit, not continued the proceedings properly and had allowed the gift deed to be set aside. The other ground was that during the pendency of the suit, Affair No. 289 of 1963, the 6th defendant herein who was shown as the guardian of the Plaintiff who was then a minor, had withdrawn from the guardianship and this was also part of the collusion. But this allegation is now pressed into service as a continuation of the suit against minor without proper representation and the decree obtained against her is null and void and that therefore, the plaintiff is entitled for a decree to set aside the earlier judgment. The second defendant filed written statement in which he contended that the earlier decree was valid and binding and that, the present suit was barred also by res judicata. It was also contended without admitting that the plaintiff was not properly represented and that it is not possible to attack the decree in a collateral proceedings. The defendants have also raised the plea of limitation. The trial Court held that the suit is not barred by limitation on the ground that the starting point for calculating the period is the date on which the decree was notified and though under Art. 59 of the Limitation Act, it is provided as three years from the date of decree as the period within which the suit will have to be filed to set aside the decree, the three years had not elapsed since the decree had not become known

to the plaintiff by any notification and the notification given to the 6th defendant who ceased to represent the plaintiff, cannot be taken as proper compliance. The trial Judge was also of the view that when the guardian of the 6th defendant was 'non suited as she was not the legal guardian of the plaintiff', the plaintiff shall be deemed to be not a party to the suit and that therefore, the decree in Affair No. 289 of 1963, could not be treated as *res Judicata*. The decision in Special Appeal No. 702 of 1967 also could not be treated as *res judicata* on the ground that the appeal was dismissed as not maintainable and it was not decided on merits. It is not necessary to deal with the other minor points decided in the case. The learned Principal District Judge, Pondicherry accordingly decreed the suit, however restricting the declaration and setting aside the decree in so far as the decree in Affair No. 289 of 1963 related to one-fourth share of the plaintiff in the house.

2. The second, third and fourth defendants and the legal representatives of the first defendant preferred A.S. No. 569 of 1975 to this Court and the learned Judge who heard the appeal allowed the same, set aside the judgment and decree of the lower Court, and dismissed the suit by his judgment dt. 23rd July, 1979. The learned Judge was of the view that the present suit was not maintainable in view of the dismissal of the Special Appeal No. 702 of 1967. The learned Judge was also of the view that the suit is barred by limitation. It is against this judgment, the plaintiff has filed this present L. P. Appeal.

3. It was contended by the learned counsel for the appellant that though originally the 6th defendant represented the plaintiff in Affair No. 289 of 1963, during pendency of the suit, she withdrew from the guardianship and no fresh guardian was appointed to represent the interest of the plaintiff and that therefore, the decree obtained against a minor who was not properly represented, shall be deemed to be null and void. At the time when Affair No. 289 of 1963 was filed, the plaintiff herein was a minor and she was represented by the 6th defendant is not in dispute. However, there is a doubt as to when the 6th defendant withdrew from the guardianship and whether the suit was conducted with the minor without a properly appointed guardian. The English translation of the French judgment in Affair No. 289 of 1963, is not very clear as to when the 6th defendant was removed from the guardianship. It is seen from that judgment that the minor

represented by the guardian was appearing through counsel and in the written statement it was contended 'Keep out of the present suit the lady Bailvunby alias Zograby and order all the contesting and agreeing parties to costs with distraction in favour of the undersigned counsels offered by law. It is not clear to what exactly is made by this passage, Again in the main part of the judgment of the Court it is stated 'whereas the fourth defendant Bailvunby alias Zograby concludes to be set aside as she is no legal guardian to the minor Rahmatbi alias Rahamathunnissa that neither the plaintiff nor, the other defendants stand against that step it is necessary to abide by it.' Here again there is some controversy as to the translation. It is stated that the words 'to be set aside' is to be read as 'to keep out' and the words 'stand against' is to be read as 'objecting'. But whatever it may be, ultimately, the operative portion of the judgment stated 'Exonerate from the suit the lady Bailvan by alias Zograby. Therefore, if at all it should be taken that it is at the time of judgment, he was permitted to keep out of the suit and the minor was allowed to remain as a party to the suit without any representation. In the grounds of appeal preferred in Special Appeal No. 702 of 1967, it was stated that during the course of the suit, the guardian of the minor 4th defendant withdrew from the proceedings and the suit went to trial with the fourth defendant unrepresented and that the guardian was struck off though the suit itself was decreed as against all the defendants. It was further stated that the first defendant who is the 5th defendant in this suit was in charge of conduct of the litigation for the defendants and for reasons best known to him, he was not diligent. Though this point was specifically mentioned there in and if true the validity of the judgment itself was open to question, the learned Judges did not go into the same; but however dismissed the appeal holding that the appeal itself was not maintainable without first filing an appeal before the first appellate authority at Pondicherry. It may also be mentioned that the cause title in Special Appeal No. 702 of 1967 showed the plaintiff as a major at the time when the appeal was filed. The learned single Judge though proceeded on the basis that the plaintiff was not represented properly after defendant 6 withdrew from the guardianship, proceeded on the assumption that the plaintiff attained the age of majority during trial of the suit itself and though she also figured as an appellant, did not question the validity of that judgment in the Special Appeal No. 702 of 1967, as null and void and that

therefore, the judgment in the special appeal barred the maintainability of the present suit. We have spent a lot of time in trying to find out whether the plaintiff was a minor on the date when the judgment, in Affair No. 289 of 1963 was delivered and whether she was properly represented in the suit. We are of the view that better evidence could have been produced by letting in oral evidence as to what happened especially when the translation of the French judgment does - not in any way help us in coming to a definite conclusion. However, we still proceed on the assumption that when the suit was filed she was a minor but represented by her guardian, but during the pendency of the suit. the guardian withdrew from the guardianship and that therefore, the minor continued as a minor without proper representation in the suit. In this connection, we are also unable to agree with both the trial Court as also the learned single Judge that the minor was not a party at all. She was a party properly represented when the suit was instituted and continued also as a party though at a later stage. she was not properly represented. If that were the position, there could be no doubt that the decree obtained against the minor without appointing a proper guardian is not valid in so far as the minor is concerned. The decree as against the other major parties, of course will remain. Therefore, the plaintiff is entitled to a decree setting aside the decree in Affair No. 289.of 1963, in so fir as her one-fourth share in the suit house is concerned.

4. But the real question for consideration is whether that would entitled -the plaintiff to get a declaration. that the suit house or her title to one-fourth share in the suit house as belonging to her absolutely, ignoring the question of validity of the gift deed dt. 4-4-1956. A similar question came up for consideration as to the further course to be adopted when a decree, against a minor not represented was set aside and not binding on the minor in the decision reported in Raghunatha Mahanty v. Ghonnu Mahanty, 1928 MWN 275. In the said case also the suit was filed to set aside the decree obtained against the plaintiff who was a minor and not represented by a guardian. While decreeing the suit and setting aside the earlier judgment against the minor; the trial Court went further and held that the plaintiff could apply for a review of the earlier judgment against the minor. This direction relating to filing of an application for review of the earlier decision and as to the further course to be adopted in such circumstances, was the subject matter f or

consideration by a Division Bench of this Court in the decision. Justice Srinivasa Ayyangar in his judgment observed -

'The only ground on which the learned Subordinate Judge in the lower appellate Court has allowed the appeal and dismissed the plaintiff's suit is that, even though in a and by a subsequent decree the previous decree might be held not to be binding and set aside, it is not open to the plaintiff, the decree obtained by whom is so set aside, to apply to the Court which passed the decree to treat the suit as though it were still pending and ask the Court to proceed to hear and dispose of, the same afresh. We asked the learned counsel for the defendant respondent to state what is the procedure that should be adopted by a plaintiff, a decree obtained by whom comes to be set aside in that manner, if he should not be at liberty to require the previous suit to be reopened and heard and disposed' of. The only answer that was attempted by the learned counsel was that he might be at liberty to file it fresh suit. It is obvious-that, if that should be held to be the proper view, great complications might ensue especially having regard to the provisions of the law of limitation. The learned Subordinate Judge in coming to that conclusion was apparently influenced by the judgment of this Court reported in Arumuga Goundan v. Periavattijappa Goundan, 1924 MWN 289 : AIR 1924 Mad 489. That was a decision of Mr. Justice Spenter as a single Judge. It seems to us, with all respect, that the decision in that case cannot be regarded as correct. We have the least hesitation in saying so, having regard, to the indubitable pronouncement of their Lordships of the Judicial Committee with regard to the question. In Tujaram's case when their Lordships of the Judicial Committee set aside the decree passed by this Court as found reported in Ganesha Rao V. Tujaram Row, 1913 MWN 575, this Court was applied to, for the purpose of restoring to its file the, appeal which had been withdrawn by the appellant on the basis of the compromise which was found by their Lordships of, the Judicial Committee not to be valid and binding, and the observations of this Court with regard to such an application are to be found in the case reported in Venkata Row v. Tujaram Row, 1917 Mad WN 30 : AIR 1917 Mad 30 as follows- 'It was next contended that if the compromise Ex. AA is set aside to any extent Tujaram Row should be permitted to prosecute O.S. 4 of 1897. We think that this contention is well founded. There can be no doubt that on principles of equity, a party who has been prevented from

enforcing his rights should be restored to the status quo ante when the party preventing him has been permitted to recede from the compact either wholly or in part.' These observations of this Court were subsequently approved in the same case when it went up before their Lordships judicial Committee again, in Venkata Rao v. Tujaram Rao, ILR 45 Mad 298 : AIR 1922 PC 69. Their Lordships observe 'It of course follows equally open that, Tujaram Rao will be entitled to prosecute his appeal and their Lordships are a little astonished to find that, although liberty has been given to him to proceed, an order has been made which has restrained the prosecution of these appeals'. There can be no doubt whatever that their Lordships read the previous decision setting aside the compromise as virtually including a permission given to the appellant to proceed with the appeal. In fact, the case with which their Lordships were, concerned was a much more extreme case than the present one because it was the case of an appeal not disposed of irregularly by the Court itself but deliberately and voluntarily withdrawn by the party and even in such a case their Lordships have clearly indicated that the proper procedure when parties are restored to the status quo ante is to reopen the case and require the same to be reheard. We might also with advantage refer to the very lucid statement of the position in two Allahabad cases, Kirpa Krishna Keshori v. Babalal, ILR 45 AR 606 : AIR 1924 All 225 and Bhagwan Dayal v. Paramsukh Das, : AIR 1917 All 477 . In the decision of Mr. Justice Spencer referred to and relied upon by the Subordinate Judge, the view appears to have been taken that, when a minor is not properly represented by a guardian ad litem and a decree is passed against him he is no party at all to the decree. This statement appears to have been derived from certain observations made by their Lordships of the Judicial Committee in other cases that, in such circumstances, the minor is not properly a party before the Court. To say that a person is not properly a party in a suit is one thing, and to say that he is not a party at all to the proceeding is quite another thing. In order that a minor may be properly represented as a party to the suit, the law requires that he should be represented in the action by a guardian ad litem and, therefore, it seems to us that there is absolutely no room for any such motion, as, that, if a decree should be set aside because a minor was not properly represented in the suit, the position should be regarded as being the same as though he was not a party to the suit at all and that any application made for the

purpose of proceedings with the suit necessarily involves an application for bringing a new party on the record. There is no question whatsoever of adding a new party.' The other Judge also agreed with this judgment and further observed that the result of setting aside the decree in the second suit will be to have the proceedings in the first suit to be prosecuted afresh from the proper stage and that it was not necessary to apply for any review at all. Thus, the ratio of this judgment is clear that when the earlier decree is set aside on the ground that the minor is not properly represented, there was no need for a further direction at all to have the suit tried afresh from the stage at which the illegality or irregularity had happened. But the result of setting aside the decree itself will have the same effect and no specific direction need be given.

5. In a later decision in *M. T. Fernando v. C.I. Philip*, : AIR1958 Ker175 , a Division Bench of the Travancore Cochin High Court considered a similar question and held that a direction also could be given in the latter suit to proceed with the trial from the stage when the guardian had withdrawn from the proceedings and in the words of the learned Judges-

'The learned Judge could suo motu have restored the prior suit and proceeded with it in view of his decree in the subsequent suit and if he could do that, we fail to see how a direction to that effect in the subsequent suit can be without jurisdiction to declare that a decree passed in a prior suit, whether by itself or by some other Court, is not binding against a particular party and, if necessary, to set it aside, we should imagine that it must have jurisdiction to declare what exactly are the rights of the parties in respect of the prior suit.'

We may also mention in this connection that the suit as originally instituted was instituted with a guardian and it is only subsequently, she was permitted to withdraw from the guardianship. The minor was shown as a party and it is not known that she was struck off from the array of parties at any time. In fact she was also shown as a party in the Special Appeal No. 702 of 1967. In the circumstances, though the plaintiff is entitled to a decree setting aside the decree in *Affair No. 289 of 1963*, in so far as the interest in the suit house is concerned, on the question as to whether the gift deed was valid under Mohammedan Law is to be, decided on

merits in the suit *Affair. No. 289 of 1963* itself. In the circumstances, the suit *Affair No. 289 of 1963* shall be restored to file in so far as the plaintiff herein is concerned and the matter decided afresh on merits. The parties will be entitled to let in such evidence as they may choose in the suit. -

6. As already stated, the learned single Judge held that the suit is barred by limitation. Both in the trial Court as also before the learned single Judge the Article of Limitation Act relied on was Art. 58 of the Limitation Act 1963. The trial Court however held that the suit is not barred by limitation on the ground that there was no notification made to the plaintiff about the decree in the earlier suit and that the limitation did not start to run till the decree became known to the plaintiff and the suit was filed within three years from the date on which the plaintiff came to the knowledge of the decree and that, therefore, it was in time. The learned Judge in coming to this conclusion was considering the period prescribed under Art. 59 only. In calculating the period of three years as prescribed under that provision, the trial Judge was also of the view that S. 14 of the Limitation Act 1963 was applicable and the period during which the plaintiff had been prosecuting with due diligence in the Special Appeal in the High Court has to be excluded. On both these points, the learned single Judge differed from the trial Court. The learned Judge held that S. 14 was not applicable as the period during which the appeal was pending could not be excluded. He was also of the view that the plaintiff was aware of passing of the decree in April, 1967 itself and therefore, the suit filed on 22-7-1970 was beyond the period of limitation. There does not appear to have been any serious dispute as to the date on which the plaintiff came to know of the decree in the earlier suit and in fact in para II of the plaint itself setting out the cause of action, the plaintiff has stated that the cause of action for the suit arose in the month of April, 1967, when the decree sought to be set aside, was passed in the suit *Affair*. Therefore, there could not be any dispute on the question of starting point. In this appeal, though the learned counsel has not raised as a specific ground any of the provisions in the French Civil Code as saving the period of limitation or bringing the suit within the time, wanted to rely on Art. 2262 of the French Civil Code in order to support the contention that the suit was in time. The plaintiff seems to have not relied on this provision in the trial Court or in the lower appellate Court. However, I do not consider it necessary to decide the issue

because even on the assumption that Art. 59 of the Limitation Act 1963 is applicable the suit would not be out of time. As already stated the plaintiff was born on 24th Nov, 1949 and she can file the suit within three years from the date of attaining the age of majority. Under Art. 388 of the French-Civil Code, a minor attains the age of majority only on attaining the age of 21 years. The suit filed on 22nd July, 1970 would, be on time. Even if we accept the contention of the learned counsel for the respondents that in 1968 the Indian Majority Acts were made applicable, and therefore, the age of majority is 18 years, still three years from 1968 will take us to 1971 and therefore, the suit was filed in time. In the circumstances, even if Art. 59 is applied, the suit could not be held to be barred by limitation.

7. In the result, as already stated there will be a declaration that the decree in suit Affair No. 289 of 1963 in so far as the share of the plaintiff is concerned is null and void. Accordingly, that portion of the decree is set aside and the suit is restored to file for consideration on merits in so far as the one fourth share of the plaintiff in the suit house is concerned. There will be a decree accordingly in the suit and the appeal is allowed in part. Parties will bear the respective costs.

8. Order accordingly.