

Mathew and Another Vs. Aleykutty and Others

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Court : Kerala

Decided On : Apr-09-2012

Judge : Thomas P. Joseph

Appeal No. : R.S.A. No. 2 of 2011 ()

Appellant : Mathew and Another

Respondent : Aleykutty and Others

Judgement :

Thomas P. Joseph, J.

1. The following are the substantial questions of law framed for a decision:

(i) When the parties to a final decree proceeding enters into a family settlement reducing the terms thereof and relinquishing their rights in the property by limiting to monetary claim, whether such a compromise becomes invalid merely because one of the co-shares who has only a fractional share in the property is not a signatory thereof?

(ii) By virtue of Order XXIII Rule 3 of the Code of Civil Procedure (for short, "the Code"), a compromise in a final decree application determining the rights of the parties become invalid if one of the parties to the suit is not a signatory thereto?

(iii) Whether a compromise relinquishing right in the property will bind the parties who executed the same?

(iv) Whether the courts below are justified in discarding the family settlement submitted as compromise merely because one of the parties is not a signatory?

2. The second appeal arises from the judgment and decree of learned Sub Judge, Muvattupuzha in A.S.No.44 of 2009 confirming final decree passed by the learned Munsiff, Muvattupuzha as per order dated 13.03.2008 on I.A.No.958 of 2008 in O.S.No.172 of 1983.

3. Shorn of frills and embroideries, short facts necessary for decision of the substantial questions framed are:

Learned Munsiff passed a preliminary decree for partition granting 1/5 share each to the 5 sharers. That was followed by the plaintiff filing I.A.No.1622 of 1997 for passing a final decree. While so, there was a settlement between some of the sharers including appellants as per which it was agreed that the female sharers would release their right over the shares allotted to them to the appellants/defendants 1 and 2 as per registered document in consideration of payment of amounts mentioned therein within 12 months from the date of settlement. If the amounts were not paid, the sharers who offered to release their shares were to have the right to realise the amount by sale of and charged on the shares. If they did not execute the release deeds, the sharers concerned were to approach the Court with a suit for specific performance. Producing that settlement, appellants/defendants 1 and 2 filed I.A.No.1441 of 2001 requesting the Court to accept the compromise and pass a decree in terms of the compromise. That application (I.A.No.1441 of 2001) was dismissed on 28.06.2001 for the short reason that all the parties to the suit and in whose favour shares have been allotted are not parties to the compromise and hence Rule 3 of Order XXIII of the Code has no application. The order on I.A.No.1441 of 2001 was not challenged. Later, by order dated 30.06.2001 learned Munsiff dismissed I.A.No.1622 of 1997 for the reason that parties are not co-operating in the matter of passing of the final decree.

4. For about seven years, there was no move from anybody. Those who agreed to purchase the shares as per agreement neither did pay the amount nor did approach the Court with a suit for specific performance for enforcement of the agreement. On 06.02.2008, appellants/defendants 1 and 2 issued Ext.A4, notice to the parties to the settlement seeking specific performance of the said agreement. They replied by Ext.A5, claiming that they are not bound to execute the documents as demanded in Ext.A4, notice. On 12.03.2008 appellants filed O.S.No.50 of 2008 for a decree for specific performance of the agreement. On 13.03.2008 plaintiff in O.S.No.172 of 1983 filed I.A.No.958 of 2008 for passing a final decree. On 08.04.2009, based on the report and plan submitted by the Advocate Commissioner learned Munsiff passed a final decree in terms of the preliminary decree. Appellants/defendants 1 and 2 challenged that final decree in A.S.No.44 of 2009.

5. In the meantime O.S.No.50 of 2008 filed by the appellants/defendants 1 and 2 for specific performance ended in a dismissal on merit. Appellants filed I.A.No.900 of 2010 in A.S.No.44 of 2009 on 28.06.2010 to raise additional grounds based on the agreement above stated. They approached this Court with W.P(C).No.18878 of 2010 seeking certain directions and this Court disposed of the writ petition on 15.07.2010. This Court observed that the question whether notwithstanding dismissal of O.S.No.50 of 2008, dismissal of I.A.No.1441 of 2001 (in O.S.No.172 of 1983) is correct or not is a matter which first appellate court may have to decide in view of Rule 1A of Order 43 of the Code. This Court directed learned Sub Judge, Muvattupuzha to dispose of A.S.No.44 of 2009 as early as possible and further, that execution of the final decree in O.S.No.172 of 1983 will stand in abeyance.

6. Learned Sub Judge disposed of A.S.No.44 of 2009.

Learned Sub Judge was of the view that the settlement reached between appellants and some of the sharers as stated in I.A.No.1441 of 2001 is not a compromise falling under Rule 3 of Order XXIII of the Code and hence the trial court was justified in rejecting I.A.No.1441 of 2001. The final decree was confirmed. Hence this second appeal.

7. Learned Senior Advocate for appellants/defendants 1 and 2 has contended that the compromise entered between appellants and some of the sharers with the second respondent alone not being a party to the said agreement, is an agreement which binds those who are parties to the said agreement.

Learned Senior Advocate argued that since preliminary decree has already been passed declaring the rights of parties and allotting shares, when a compromise is effected between some of the parties to the suit after such preliminary decree the compromise comes within the scope of Rule 3 of Order XXIII of the Code notwithstanding that the second respondent has not signed the compromise. Learned Senior Advocate has contended that the suit is compromised in part to the extent it concerned the parties to the compromise and hence Rule 3 of Order XXIII of the Code would apply. It is contended that appellants did not challenge the order on I.A.No.1441 of 2001 since subsequently the application for passing final decree (I.A.No.1622 of 1997) itself was dismissed by order dated 30.06.2001. It is contended that when the final decree passed as per order on I.A.No.958 of 2008 is challenged in appeal, it is open to the appellants/defendants 1 and 2 to challenge correctness of the order dated 28.06.2001 on I.A.No.1441 of 2001 in that appeal invoking Rule 1A of Order 43 of the Code. It is contended, with reference to the Kerala version of Rule 18 of Order XX of the Code that the further direction that the Court is required to issue as per the said provision means passing of final decree or passing other orders which includes granting a decree in terms of the settlement reached between appellants and other parties to the settlement. It is argued that the agreement being in the nature of a family settlement ought to have been accepted by the courts below. Reliance is placed on the decisions in *Banwari Lal Vs. Smt. Chando Devi and Anr.* (AIR 1993 SC 1139), *Rachakonda Venkatrao and Ors. Vs. Late R. Satya Bai and Ors.* ((1996)1 SCC 671) and *Pandit Dhreshwarji's Ashram School Vs. Arya Pratinidhi Sabha and Anr.* (2007(4) ALD 672).

8. Learned counsel for respondents contend that the compromise vide I.A.No.1441 of 2001 was not involving all the parties to the suit and hence it cannot come within the purview of Rule 3 of Order XXIII of the Code. It is also contended that the said compromise agreement cannot be treated as a family settlement since all

the parties to the suit are not parties to the said agreement. According to the learned counsel, the order dated 28.06.2001 on I.A.No.1441 of 2001 was liable to be challenged in appropriate proceedings and as provided underlaw. Learned counsel has placed reliance on the decisions in In the matter of Tapeswar Misra, Contemner (AIR 1972 Patna 16), Sanjasi Jena and Ors. Vs. Mina Jena and Ors. (AIR 1984 Orissa 213), M.L.Subbaraya Setty and Ors. Vs. M.L.Nagappa Setty and Ors. ((2002)4 SCC 743) and Sneh Gupta Vs. Devi Sarup (2009(2) KLT SN 58 (C.No.63)).

9. Rule 3 of Order XXIII of the Code refers to the procedure to be followed when it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties. The second respondent to whom a share is allotted as per the final decree is not a party in I.A.No.1441 of 2001. The settlement as referred in I.A.No.1441 of 2001 cannot be treated as a family settlement for the simple reason that the second respondent to whom a share is allotted is not a party to that agreement and a family settlement involves all the claimants and is intended to settle all the disputes. Settlement of a dispute between some of the members of the family is not a family settlement (See In the matter of Tapeswar Misra (supra), paragraph 9).

10. Could the agreement referred to in I.A.No.1441 of 2001 be brought within Rule 3 of Order XXIII of the Code?. Admitted, the second respondent is not a party to that agreement notwithstanding that he is allotted a share as per the preliminary decree. In the matter of Tapeswar Misra (supra) and Sanjasi Jena and Ors. Vs. Mina Jena and Ors. (supra) it is held that an agreement not involving all the parties to the litigation is not one coming under Rule 3 of Order XXIII of the Code. The above decisions show that there was a compromise between some of the parties to the suit for partition involving bulk of the properties and which was likely to affect those who were not parties to the compromise prejudicially. In the latter decision it is stated that "generally" such compromise will not be recognised. The reason is that such compromise may prejudicially affect the right of those who are not parties to the compromise.

11. In view of Rule 6 of Order XII r/w Rule 3 of Order XXIII, it is possible to have a decree on compromise involving some of the parties to the suit and a decree on merit as regards others. This is indicated by the decisions in Bai Chanchal and Ors. Vs. Syed Jalaluddin and Ors. (AIR 1971 SC 1081), Ramachandra Bhikchand Nahar Vs. Narhar Maruti Udavant (AIR 1996 Bombay 338) and Apani Dei and Anr. Vs. Purma Chandra Nayak and Ors. (AIR 1998 Orissa 145). But that depends on the nature of the dispute involved and claims made in the suit. If the decree could be divisible and separate such a course could be adopted. If the decree could not be divisible and separate, there could not a compromise decree concerning some of the parties to the suit and a decree on merit concerning others.

12. In this case, the settlement vide I.A.No.1441 of 2001 is after the preliminary decree is passed declaring the rights of the parties and allotting shares to them. Hence even if the second respondent is not agreeable, there could be a compromise between other parties to the suit. That compromise would not affect the right or share of the second respondent. Hence it could not be said that the compromise is one not coming within the scope of Rule 3 of Order XXIII of the Code. The said view of the trial and first appellate courts cannot be sustained.

13. But then, the real question is whether the compromise referred in I.A.No.1441 of 2001 is one which either wholly or in part adjusts the suit or is in satisfaction of the whole or part of the subject matter of the suit? The terms and conditions of the agreement referred in I.A.No.1441 of 2001 show that it is simply executory in character, with a mere offer by some of the sharers to release their shares to the appellants subject to the condition. Appellants were to pay off the releasing sharers within twelve months and get the release deeds executed. The releasing sharers, no doubt were to have a money claim. But appellants, in case the release deeds were not executed, were to approach the Court and enforce the agreement. It is not as if the sharers of the consenting parties were released to the appellants - there was only an agreement to release. In other words, the agreement by itself did not amount to an adjustment of the suit or satisfaction of the whole or part of the subject matter of the suit even concerning the parties to I.A.No.1441 of 2001. Even if I.A.No.1441 of 2001 is allowed, that would not finally dispose of the final decree proceedings even concerning parties to I.A.No.1441 of 2001. For, passing

an order allowing I.A.No.1441 of 2001 would not and could not change the character of the agreement as an executory contract. If pursuant to the order on I.A.No.1441 of 2001 the releasing co-sharer refused to execute release deed, the order on I.A.No.1441 of 2001 or even a decree as prayed for in I.A.No.1441 of 2001 could not be executed - parties had to file a separate suit for enforcement of the agreement vide I.A.No.1441 of 2001. In that view, the settlement vide I.A.No.1441 of 2001 could not be treated as an adjustment of the suit or satisfaction of the whole or part of subject matter of the suit as understood in Rule 3 of Order XXIII of the Code.

Hence trial and first appellate courts were justified in its ultimate decision dismissing I.A.No.1441 of 2001.

14. So far the request to allow I.A.No.1441 of 2001 now made is concerned, it is years after dismissal of I.A.No.1441 of 2001. The consenting parties are entitled to contend that the agreement is not enforceable now for various reasons such as law of limitation, exercise of discretion due to escalation of prices due to the long lapse of time etc. They took up, successfully, their defences in O.S.No.50 of 2008 - the suit filed by the appellants for specific enforcement of the agreement vide I.A.No.1441 of 2001 stands dismissed. Hence, in this proceeding appellants cannot plead that I.A.No.1441 of 2001 be allowed. Appellants have to try their chance in R.F.A.No.525 of 2010 arising from the dismissal of O.S.No.50 of 2008. In view of R.F.A.No.525 of 2010 this Court need not go into the enforceability of the agreement vide I.A.No.1441 of 2001. Hence I refrain from going into that question.

15. In the light of what I have stated above, the contention raised in this appeal cannot be accepted.

16. The substantial questions of law framed are answered as above.

17. As above stated, dismissal of O.S.No.50 of 2008 is under challenge in R.F.A.No.525 of 2010 and that appeal is yet to be disposed of. It is only appropriate and it should be the final decree under challenge in this appeal and execution of the final decree if any levied are made subject to the result of

R.F.A.No.525 of 2010. Hence it is directed that the final decree under challenge in O.S.No.172 of 1983 and execution of that final decree if any done in the meantime will be subject to the result of R.F.A.No.525 of 2010.

18. Learned Senior Advocate for appellants pointed out that there was althroughout an order keeping the execution of final decree in O.S.No.172 of 1983 in abeyance and that steps in R.F.A.No.525 of 2010 are not complete so that the said appeal could be disposed of as early as possible. Having heard learned counsel on both sides I direct that execution of the final decree under challenge in this case will stand in abeyance till 30.06.2012 or till appropriate orders in this regard is passed in R.F.A.No.525 of 2010, whichever is earlier.

With the above directions the second appeal is dismissed.

No costs.

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