Keka vs Sirajuddin And Ors. on 22 January, 1951

Equivalent citations: AIR1951ALL618, AIR 1951 ALLAHABAD 618

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Bench: V. Bhargava

JUDGMENT

Malik, C.J.

1. This is a pltf's. appeal. The pltf. filed a suit for realisation of the money due on a mtge. dated 30-6-1933, by sale of the mtged. property. The mtge. deed was executed by seven persons, Sirajuddin, Mohammad Saghir, Abdul, Kabir, Ekram Khan, Sm. Saira, Sm Habibunnisa & Sm. Aisha. Ekram Khan is dead & he is represented by defts. 7 to 11 who are his legal representatives. The claim was for a sum of Rs. 3,000.

2. Various defences were taken, but we are now concerned with only two of them : (1) that Abdul Kabir & Sm. Habibunnisa were minors & they could not, therefore, be parties to the mtge. & (2) that Sm. Saira & Sm. Aisha were pardanashin women & the deed not having been explained to them the execution on their behalf was, therefore, bad.

3. The learned Munsif held that Abdul Kabir & Sm. Habiun-nisa were minors on the date of the mtge. & that it had not been established that Sm. Saira & Sm. Aisha, who were pardanashin women, had executed the mtge. deed in accordance with law relating to pardanashin ladies. The learned Munsif, therefore, dismissed the suit as against Abdul Kabir, Sm. Saira, Sm. Habibunnisa & Sm. Aisha, defts 3 to 6. He, however, decreed the suit against the other defts, after having reduced the amount as in his view the rate of interest was excessive.

4. The judgment-debtors filed an appeal before the learned Dist. J. who affirmed the findings of the learned Munsif that defts. 3 & 5 were minors that defts 4 & 6 were pardanashin, that the execution by the minors was void & that it had not been established that the pardanashin women had executed the document in accordance with law. Having affirmed these findings the question arose for consideration whether the fact, that four out of seven executants had not duly executed the document, had any effect on the execution by the remaining three. The learned Judge was of the opinion that the pltf. could not claim the money even against those who had duly executed the document & dismissed the pltf's. suit in its entirety.

5. This second appeal has been filed by the pltf. & on his behalf it has been urged by learned counsel that the decree passed by the trial Ct. was correct & that it should be restored. Learned counsel has

contended that the fact that the mtge. deed was not duly executed by defts. 3 to 6 could not take away the pltf's. right to proceed against the others, i. e. Sirajuddin, Mohammad Saghir & the legal representatives of Ekram Khan who had duly executed the mtge. deed & had borrowed the money.

6. In a similar case before their Lordships of the Judicial Committee Jamna Bai v. Vasanta Rao, 43 I. A. 99 : (A.I.R. (3) 1916 P. C. 2) where a suit was brought for recovery of money on the basis of a bond executed by two persons, one of whom happened to be a minor, their Lordships held that the minor was not liable, but decreed the suit against the other executant. The relevant portion of the judgment is as follows :

> "The H. C., therefore, rightly held him (Sethuram minor) not liable to the pltf. under the bond. But this furnishes Jamna Bai with no answer to the pltf's. claim against her. Stripped of all that is not relevant, the plea advanced on her behalf is that one of two promisors can plead the minority & consequent immunity of the other as a bar to the promisee's claim against him. This is a position that cannot be maintained, & the plea has been properly rejected by the H. C."

These observations of their Lordships of the Judicial Committee concluded the matter & it is not, therefore, necessary for us to discuss it at any great length. The law has been well summarised in Halsbury's Laws of England, Hailsham Edn. Vol. 10, para. 267 as follows :

> "When a deed is expressed to be made between several parties or a deed poll to be made by more persons than one, & some or one only of such parties or persons execute the same, it is not the deed of any person who has not executed it. But unless it was delivered as an escrow to take effect only in case of & upon its execution by all or some other of the parties thereto, it is the deed of every person who has executed it, &, owing to his being estopped from averring anything in contradiction thereof, it takes effect, as against him, according to its purport from the time of his execution thereof, notwithstanding that the other party or parties have neither executed it nor expressed his or their assent to its provisions."

Some of the decisions relied on by the learned Dist. J. are based on the observations of Lord Denman C. J. in Latch v. Wedlake, (1840) 11 Ad and El. 959 : (9 L. J. (N. S.) Q. B. 201). In that case there was an agreement by which the defts. had agreed to deliver to the pltf. a certain supply of coals from certain collieries for a term of three years at a certain price & with certain stipulations as to carriage, place of delivery, times & mode of payment etc. There was also a stipulation for a lease by the defts. of a wharf which was to be the place of delivery. One Rosser Thomas declined to execute the document & the question was whether it was a completed agreement as between those who had signed it. There was some evidence as to the way some of the parties had acted after this agreement. The learned Chief Justice expressed the opinion that the circumstances mentioned by him "raised a prior question proper to have been submitted to the jury, whether the intention of all the parties was not that Rosser Thomas should be an actual party to the agreement and whether the pltf., on his part, did not contract on the faith that Rosser Thomas should join, & he thereby have his additional security for the performance of the agreement; & whether the defts. on theirs, did not execute upon

the understanding that Rosser Thomas was consenting to & would join in executing the instrument."

The cases relied on by the learned Dist. J. Mt. Walayat Jan v. Jamal Din, A. I. R. (21) 1934 Lah. 262 : (151 I. C. 462); Kishan Dayal v. Rodu, 53 I. C. 813 : (A. I. R. (6) 1919 Lah. 78) & Ramchandra v. Ruprao, 64 I. C. 726 : (A. I. R. (8) 1921 Nag. 66) do not, therefore, help the respts. In Mt. Walayat Jan v. Jamal Din, A.I.R. (21) 1934 Lah. 262 : (151 I. C. 462) no reasons have been given. The case of Partap Singh v. Sant Kuar, A.I.R. (25) 1938 P. C. 181 : (I. L. R. (1938) Lah. 313) is distinguishable. That was a case where a family, settlement was executed between several persons & it could not be held that it was binding in part & not binding as regards the rest. One of the parties having been held to be a minor & the document not having been held to be binding as against her, their Lordships said that it did not bind the elder sister also. Obviously an agreement of that nature could not be held to be binding in part & that decision cannot apply to a case like the present where the mtgors. have a joint & several liability to pay the mtge. debt. The mtgee could realise the whole of the amount from any one of his debtors & it could not, therefore, be said that the mere fact that four of the mtgors. not being bound by the mtge. exonerated the others from repaying the money which they had borrowed.

7. The result, therefore, is that this appeal is allowed, the decree of the lower appellate Ct. is set aside & the decree of the trial Ct. is restored with costs in all the Courts.