

Omana Vs. Kesavan

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Court : Kerala

Decided On : Jan-27-2005

Reported in : 2005(1)KLT893

Judge : R. Bhaskaran, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 122

Appeal No. : S.A. No. 948 of 1996

Appellant : Omana

Respondent : Kesavan

Advocate for Def. : V. Giri, Adv.

Advocate for Pet/Ap. : V.N. Swaminathan, Adv.

Judgement :

R. Bhaskaran, J.

1. The questions of law formulated in the second appeal on which learned counsel on both sides were heard read as follows:

1. Whether the Courts below were right in interpreting Ext.A1 as a gift deed?

2. Whether the suit had not abated as a whole when the petition to implead the legal heirs of the 1st plaintiff was dismissed?

After hearing the learned counsel on both sides at length I feel that both questions are substantial questions to be considered in the appeal.

Question No. 1

2. The facts of the case are not in dispute. The first defendant Kalyani was the admitted owner of the plaint schedule property. Kalyani has no issues. The plaintiffs are the children of Kalyani's sister and defendants 3 and 2 are the son and daughter-in-law respectively of Kalyani's brother. Ext.A1 is the alleged gift deed executed by Kalyani in favour of plaintiffs. Ext. A3 is the cancellation deed of Ext. A1 by Kalyani and Exts. A2 and A4 are the sale deeds of portions of plaint schedule property to defendants 2 and 3 respectively by Kalyani.

3. If Ext.A1 has taken effect as a gift, Kalyani has no right to execute Exts.A2 to A4. If it was not a gift Exts.A2 to A4 cannot be challenged. Both Courts have interpreted Ext. A1 as a gift deed. The first question to be considered is whether Ext.A1 is a gift deed or not. The document is styled as a gift deed. The relevant Clause in the document read as under:

4. The entire disposition is contained in one sentence. Translated into English it will read as follows:

'Since I have no children and you are the children of my elder sister and are living at my beck and call I have given the schedule property as gift on the basis of my love and affection to you for your enjoyment on mutation in revenue records and change of patta, so however that I will continue to keep possession and take income from the property and for valid necessity will be entitled to create simple mortgage of the property for a maximum of rupees seventy five without time limit and you have no right to object to it and after my life time you have to enjoy it with absolute right of transfer and the scheduled property is in Thandaper 4040 and approximately valued at Rs. 100/-.'

5. There is no dispute that while interpreting a document it should be read as a whole and a harmonious construction of various clauses has to be made. The nomenclature is also important though not conclusive. The intention of the executant as revealed from the words used in the document has to be ascertained. The question to be considered is whether there is absolute vesting of the property on the executee as on the date of the document or is it postponed till the death of the executant. Mere reservation of the right to enjoy the property during the life time of the donor will not make the document something other than a gift if there is transfer in presentation the date of the execution of the gift deed. Bearing in mind the above principles the various clauses in the document can be examined.

6. The reason for executing the document is that Kalyani, the executant has no children. The plaintiffs are the children of her elder sister. They are at her beck and call and she has love and affection for them. Therefore the property is given to them as gift after relinquishing all her rights and liabilities. It is for their enjoyment on mutation in revenue records and transfer of patta. Kalyani will enjoy the property during her life time. She will have the right to encumber the property for amounts upto Rs. 75/-. The total value of the property is Rs. 100/-. After her life time the plaintiffs will have full right of alienation and enjoyment. This analysis will show that absolute right is given to the executees only after her life time and till then they are not given full right to deal with the property by transfer or otherwise. It is true that Kalyani has intended the plaintiff to enjoy the property after mutation in revenue records and change of patta. Admittedly, neither the mutation in revenue records nor payment of revenue was made after the execution of the deed by the plaintiffs. There cannot be full right for a transferee unless he or she is given the right to deal with the property as full owner. The full ownership is given only after the life time of Kalyani. If that is so can we be carried away by the nomenclature and the description of the document in the cancellation deed as a gift deed. The Appellate Court noticed the last clause in the same sentence of disposition, but did not give necessary importance to the actual vesting of the property as per the document. Therefore I am of opinion that the document lacks the essential ingredient of a gift by immediate transfer of absolute right to the donee. Even though reservation of right to enjoy during the life time of the donor

by itself will not make the document other than a gift, the last clause in the above quoted sentence shows that right to transfer which is an indicia of absolute right to property is given only after the death of Kalyani. According to the learned counsel for the respondents, after a gift is made in favour of the plaintiffs subsequent clause which restricts the right of the plaintiffs is invalid. As already noted, the document has to be read as a whole. In this case, the very sentence of disposition contains all the clauses and the disposition is complete only by the last clause which restricts the right of disposal of the property.

7. The learned counsel for the appellants Sri. V.N. Swaminathan has rightly brought to my notice the decision of the Apex Court in *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker* ((1997) 2 SCC 255). The facts of the case are almost similar to the facts of this case as can be seen from para.3 of the judgment which reads as follows:

'It is now well-settled legal position that a document has to be read harmoniously as a whole giving effect to all the clauses contained in the document which manifest the intention of the persons who execute the document. The material part of the gift deed reads as under.

'The said immovable property as described above with the ground floor and with the ways to pass and with the water disposal and with all other concerned rights, titles is gifted to you and the possession whereof is handed over to you under the following conditions to be observed by you and your heirs and legal representatives as long as the sun and the moon shine. Therefore, now I or my heirs or legal representatives have no right on the said property. You and your heirs and legal representatives have become the exclusive owners of the same. You and your heirs and legal representatives are entitled to enjoy, to transfer or to use the said property as you like under the conditions mentioned in this deed. Except myself, there is nobody's right, title, interest or share on the said property. I have not mortgaged the same by any document. Yet however if anybody comes forward to claim the right, I shall remove the same.

The said property is gifted to you on such conditions that you are made owners by the gift deed of the said property on such conditions that there are 15 rooms on

the said property at present. I am rightful to receive the rents and the mesne profit whatsoever accrued from the said rooms throughout my life. I am only entitled to receive the mesne profit of the said property till I live. Therefore, I, the executant, shall be entitled to let out the said buildings (rooms), to receive the rent amount to make all the other arrangement throughout my life. Similarly the said property shall be in my possession till I live. Therefore, I have gifted this property to you by reserving permanently my rights to collect the mesne profit of the existing rooms throughout my life. And by this gift deed the limited ownership right will be conferred to you till I live. After my death you are entitled to transfer the said property. I shall not give in any way my right to anybody to collect the mesne profit. You may get transferred the said property in your name in support of this deed. This gift deed is executed to you under the aforesaid conditions.'

8. In para.7 of the same judgment it is held as follows:

'There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime. The recitals in the cancellation deed is consistent with the recitals in the gift deed. He had expressly stated that the respondent had cheated him and he had not fulfilled the conditions subject to which there was an oral understanding between them. Consequently, he mentioned that the conditional gift given to him was cancelled.'

In the absence of a valid divesting of the absolute right of the donor in favour of the donee before the death of the donor it cannot be said that there was a valid gift created by Kalyani.

9. Another important fact to be noted in this case is that Kalyani reserved to herself the right to encumber the property upto Rs. 75/- whereas the value of the property was shown as Rs. 100/-. If by the gift deed she had divested of all her rights, how she could reserve the right to encumber the property to the extent of 3/4th of its value. It is inconsistent with as absolute gift in presenti. Therefore, the intention of Kalyani was that the plaintiffs should get the property after her life time on the assumption that they will remain to be loyal to her and be at her beck and call. But things changed and she was compelled to cancel the document and execute two sale deeds in favour of defendants 2 and 3 of portions of the plaint schedule property.

10. Was there an acceptance of the gift by the plaintiffs? According to the Courts below the document was presented for registration by the first plaintiff and was got back by him and that is clear proof of acceptance. The learned counsel for the respondents also submitted that in a case where the gift is not onerous very little evidence is sufficient to show acceptance of a gift as no person will refuse to accept property if given to him or her as and when it comes to his or her knowledge. In this case since the plaintiffs had knowledge of the gift they are deemed to have accepted it on the same day. In the normal course that would have been sufficient. But in the present case Kalyani has authorised the plaintiffs to enjoy the property after getting the mutation in revenue records and change of patta. Admittedly no mutation was effected, no changed patta was obtained and no payment of revenue was made by the plaintiffs. The 2nd plaintiff examined as PW. 1 has admitted that as per the gift deed the plaintiff will get possession and right of alienation only after the death of the 1st defendant. That was how the plaintiff also understood the document. Therefore apart from getting back the original of the document there is nothing to show that the gift was accepted and acted upon by the plaintiffs. Since I have already found that there was no valid gift executed in favour of the plaintiffs, there is no necessity to consider this question further. Even if taking back the original gift deed can be taken as proof of acceptance of gift, in the absence of vesting of absolute right, on the date of the execution of gift deed in favour of the plaintiffs, I answer the first question in favour of the appellants and against the respondents.

Question No. 2

11. The learned counsel for the respondents objected to the consideration of this question as no such contention was raised in the Appellate Court. While examined as PW.1, the 2nd plaintiff has stated that the entire right has been given to him. But no document was produced for that purpose and when the 1st plaintiff died, there was no petition filed to record the other plaintiffs as legal heirs to make out that the right of the 1st plaintiff has vested on the 2nd plaintiff or plaintiffs 2 and 3 together. As per Order 22 Rule 2, it is mandatory that the Court should make a record if the right to sue survives to the surviving plaintiff. But in paragraph 4 of the judgment it is stated that the 1st plaintiff died and legal representatives of the 1st plaintiff were not impleaded. The right to sue survived on the surviving plaintiffs. It is not known on what basis the Trial Court has made such an observation. The defendants did not make an issue on this aspect either in the Trial Court or in the Appellate Court. Therefore, I do not want to decide this question finally in this second appeal.

12. The learned counsel for the appellant has relied on the decision of the Supreme Court in *State of Punjab v. Nathu Ram* (AIR 1962 SC 89). In that case, the Supreme Court held as follows:

'The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and

the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.'

That decision was followed by the Supreme Court in *Sri. Chand v. Jagdish Pershad* (AIR 1966 SC 1427) and other cases. If the defendants had brought it to the notice of the Trial Court or the Appellate Court, there was every possibility of the Courts below to follow the decisions of the Supreme Court and to hold that there was abatement except when the surviving plaintiffs show reason that the rights of the 1st plaintiff has vested in the 2nd plaintiff or plaintiffs 2 and 3 together. Whether the 1st plaintiff has legal representatives to be impleaded or not are also matters which could have been gone into by the Trial Court. In view of the fact that I have already found that the plaintiffs have not obtained any title on the basis of Ext.A1 as a gift deed and that the 1st defendant has revoked the same during her lifetime and given the properties to defendants 2 and 3, it is unnecessary to consider this question in further detail and therefore this question is not answered in favour of the appellants.

Construction of document raises substantial question of law as held by the Supreme Court in *Santha Kumari v. Lakshmi Amma* (2000 (3) KLT SN 49 = 2000 (2) KLJ (NOC) 37) and in view of my answer to question No. 1, the second appeal is allowed and the concurrent findings of the Trial Court as well as the Appellate Court are set aside and the suit is dismissed. The appellants will be entitled to their costs in the second appeal.

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