

**Gopalakrishnan Vs. Rajamma**

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**Court :** Kerala

**Decided On :** Jul-14-2006

**Reported in :** 2006(4)KLT377

**Judge :** V. Ramkumar, J.

**Acts :** Transfer of Property Act - Sections 122 and 126; [Specific Relief Act, 1963](#) - Sections 31; [Limitation Act, 1963](#) - Sections 3 - Schedule - Articles 59, 60 and 113; [Hindu Minority and Guardianship Act, 1956](#) - Sections 6, 8, 8(2) and 11; [Indian Contract Act, 1872](#) - Sections 19 and 19A; [Evidence Act, 1872](#) - Sections 44 and 114; Kerala Stamp Act

**Appeal No. :** S.A. No. 739 of 1995

**Appellant :** Gopalakrishnan

**Respondent :** Rajamma

**Advocate for Def. :** N.N. Sugunapalan, Sr. Adv.,; P.S. Krishna Pillai,; Sajee

**Advocate for Pet/Ap. :** P.G. Parameswara Panicker, Sr. Adv. and; P. Gopal, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**V. Ramkumar, J.**

1. Defendants 1, 4 and 5 in O.S. No. 78/1986 on the file of the Additional Sub Court, Alappuzha are the appellants in this Second Appeal. Pending this Second Appeal the 1st defendant who was the 1st appellant died and defendants 4 and 5, who are his children and who are appellants 2 and 3 respectively, were recorded as his legal representatives.

2. The aforementioned suit instituted by the 1st respondent herein was one for a declaration of the plaintiff's title and possession over plaintiff schedule item No. 1, for setting aside the decrees passed in two earlier suits, for setting aside Ext. A-3 settlement deed dated 22-8-1966 executed by the plaintiff's mother, for recovery of two items of properties with mesne profits and for partition and separate possession of the plaintiff's share in respect of two other items of the plaintiff schedule properties.

### Plaintiffs Case In The Pleadings

3. The case of the plaintiff can be summarised as follows:

The plaintiff and defendants 1 to 3 are the children of late Kunjipillai Amma who died in the year 1973. Bhaskara Panicker, who was one of the sons of the said Kunjipillai Amma, died unmarried on 23-12-1981. The plaintiff and defendants 1 to 3 are the legal heirs of Kunjipillai Amma and Bhaskara Panicker referred to above. Defendants 4 and 5 are the children of the 1st defendant. The plaintiff schedule properties are portions of the properties settled in favour of Kunjipillai Amma as per Ext.A-1 settlement deed dt. 11-3-1118 M.E. executed by Kunju Charappan Thampan, the husband of Kunjipillai Amma. As per Ext.A2 settlement deed dt. 6-10-1958 Kunjipillai Amma settled the plaintiff schedule properties in favour of her children. Item No. 1 of the plaintiff schedule property was thus settled in favour of the plaintiff. After settling various items of properties in favour of her children Kunjipillai Amma retained 7 items of properties with her and those properties are described in the F Schedule to Ext.A-2 settlement deed. In August 1966 Kunjipillai Amma requested the 1st defendant, who was her eldest son, to prepare a settlement deed for distributing the properties retained by her under Ext.A-2 equally among her five children. However, the 1st defendant prepared Ext.A-3 settlement deed dt. 22-8-1966 violating the directions given by Kunjipillai Amma

and taking to himself major share of the properties and allotting small portions of properties to the 3rd defendant and deceased Bhaskara Panicker and leaving nothing to the plaintiff and the 2nd defendant. He had also fraudulently included in his share plaint schedule item No. 1 which was already settled in favour of the plaintiff under Ext.A-2 settlement deed. Similarly, taking advantage of the mistake in the extent shown for the property allotted to the 3rd defendant as per the D Schedule to Ext.A-2 settlement deed wherein instead of 95 cents comprised in Sy.No. 20/5, 45 cents alone was shown, the 1st defendant fraudulently included the balance 50 cents to his share. Kunjipillai Amma was illiterate, old and sickly and believing her eldest son (1st defendant) that the settlement deed was prepared by him as directed by her, she signed Ext.A-3 document and registered the same as document No. 4860/1966. Bhaskara Panicker and defendants 2 and 3 were ignorant about the fraudulent acts of the 1st defendant. The 1st defendant had also incorporated a recital in Ext.A-3 enabling him to join as additional plaintiff in O.S. No. 279/1963 before the Munsiff's Court, Cherthala, filed by Kunjipillai Amma in respect of item No. 2 of the A Schedule of Ext.A-3 corresponding to plaint schedule item No. 3. Thereafter, the 1st defendant filed a petition to get himself impleaded in the said suit. Then only Kunjipillai Amma came to know about the fraud practised by the 1st defendant. Thereupon she executed Ext.A-4 settlement deed dt. 22-8-1966 revoking Ext.A-3 settlement deed and reserving plaint schedule item No. 3 to herself under F Schedule thereto and allotting the remaining properties equally among her children. The plaint schedule item No. 2 was allotted to the plaintiff under the E Schedule to Ext.A-4 settlement deed. The impleading petition filed by the 1st defendant in O.S. No. 279/1963 referred to above was dismissed holding that his right was to file a separate suit. Accordingly, the 1st defendant filed O.S. No. 318/1969 before the Cherthala Munsiff's Court for declaration of his right over the plaint schedule item No. 3 under Ext.A-3 settlement deed and also to cancel Ext.A-5 settlement deed subsequently executed by his mother. The plaintiff herein was the 5th defendant and Kunjipillai Amma was the 1st defendant and defendants 2 and 3 herein were defendants 3 and 4 in O.S. No. 318/1969. Deceased Bhaskara Panicker was the 2nd defendant in that suit. Bhaskara Panicker and the 3rd defendant herein had no notice in that suit. In order to avoid a contest by the plaintiff and the 3rd defendant herein, the

1st defendant herein executed Ext.A-5 release deed dt. 24-6-1970 in favour of the present plaintiff and Ext.B-7 gift deed dt. 16-12-1970 in favour of the 3rd defendant. As per Ext.A-5 release deed, the 1st defendant herein surrendered to the plaintiff his rights over the plaint schedule item No. 1 which is 1 acre of paramba comprised in Sy. No. 19/1 A which had already been settled by the mother in favour of the plaintiff under the E Schedule to Ext.A-2 settlement deed and which was fraudulently included by the 1st defendant to his share in Ext.A-3 settlement deed. As per Ext.B-7 gift deed, the 1st defendant transferred to the 3rd defendant his rights over 50 cents of land in Sy. No. 20/5 which was already allotted to the 3rd defendant as per the D Schedule to Ext.A-2 settlement deed and which had been fraudulently included in his share under Ext.A-3 settlement deed. By practising fraud and misrepresentation the 1st defendant succeeded in getting joint statements filed by the plaintiff and the 3rd defendant to the effect that they do not press their contentions. Kunjipillai Amma who was the 1st defendant in that suit alone contested the suit. But she was aged and was not possessed of sufficient funds. The 1st defendant, therefore, managed to keep her aloof from the other children and he, accordingly, obtained a decree declaring his right in respect of plaint schedule item No. 3 and cancelling Ext.A-4 subsequent settlement deed executed by Kunjipillai Amma. Pending that suit Kunjipillai Amma also had filed a separate suit as O.S. No. 554/1969 before the Munsiff's Court, Cherthala for cancellation of Ext.A-3 settlement deed. In view of the compromise entered into between the 1st defendant herein and the 3rd defendant herein in O.S. No. 318/1969, the 1st defendant managed to get the 3rd defendant's contention also withdrawn and, accordingly, O.S. No. 554/ 1969 was dismissed on 2-2-1972 as barred by res judicata. Kunjipillai Amma died thereafter in the year 1973 at the age of 84. With regard to plaint schedule item No. 1 which stood allotted to the plaintiff, the 1st defendant raised objections against the plaintiff enjoying the same necessitating the plaintiff to lodge a complaint before the Sub Divisional Magistrate. The proceedings before the Sub Divisional Magistrate were got compromised by the 1st defendant setting up an agreement by the plaintiff herein to sell the said item to him for a sum of Rs. 20,000. Even assuming that the joint statement to that effect filed before the Sub Divisional Magistrate could be treated as an agreement enforceable in law, the two years stipulated therein expired on

10-1 -1981. Long thereafter on 30-9-1981 the 1st defendant issued a lawyer notice to the plaintiff demanding specific performance of the said joint statement. The plaintiff had sent a reply to the said notice. Thereafter defendants 4 and 5 who are the children of the 1st defendant filed O.S. No. 488/1981 before the Munsiff's Court, Cherthala for an injunction. The said suit was subsequently re-numbered as O.S. No. 77/1986 before the Sub Court, Alappuzha. It was while scrutinising the document for filing a written statement in that suit that the plaintiff came to know that the decrees in O.S. Nos.318 and 554 of 1969 were obtained by the 1st defendant fraudulently. Those decrees are not binding upon the plaintiff since they are vitiated by fraud and misrepresentation. Hence the suit. The 6th defendant is an assignee from the 1st defendant in respect of 40 cents of land comprised in Sy.No.18/6.

4. Defendants 2 and 3 virtually supported the plaintiff.

#### Pleadings In Defence

5. The suit was resisted by defendants 1 and 6 who filed separate written statements.

6. The 1st defendant opposed the suit claim contending inter alia as follows:

The suit is not maintainable and is really a counter blast to O.S. No. 79/1986 which is a suit for specific performance filed by this defendant against the plaintiff in respect of plaint schedule item No. 1. The execution of Ext.A-3 settlement deed by Kunjipillai Amma is admitted. But the rest of the plaint averments are not correct. No fraud or misrepresentation was practised by this defendant as alleged. Ext.A-3 settlement deed was executed by Kunjipillai Amma voluntarily and with full knowledge about the allotment thereunder and the contents of the same. At that time she was quite healthy and was managing her own affairs. It was consistent with the provisions in Ext.A-3 settlement deed that this defendant filed a petition to implead him as additional plaintiff in O.S. No. 279/1963. But it was the plaintiff and others who prevailed upon Kunjipillai Amma to resist the impleading petition. In fact, it is as a result of fraud and undue influence practised by the plaintiff and others upon Kunjipillai Amma that Ext.A-4 settlement deed came to be executed.

O.S. No. 318/1969 filed by this defendant has been decreed after full contest and the fraud and misrepresentation alleged against this defendant are false. O.S. No. 554/1969 was instituted by Kunjipillai Amma at the instance of the plaintiff and others. The plaintiff had agreed to sell the plaint schedule item No. 1 in favour of this defendant. The plaint allegations are made by way of defence to the suit O.S. No. 79/1986 filed by this defendant against the plaintiff for specific performance of the agreement executed by her. The decrees passed in O.S. No. 318/1969 and 554/1969 are valid and binding on the plaintiff and the other parties. The plaintiff is not entitled to get the decrees passed in the aforesaid suits set aside nor is Ext.A-3 settlement deed executed by Kunjipillai Amma liable to be set aside. Ext.A-21 sale deed dt. 8-1-1980 executed by this defendant in favour of the 6th defendant in respect of 40 cents of land comprised in Sy. No. 18/6 is a valid document and the same cannot be ignored by the plaintiff. The plaintiff is not entitled to recover the said property from the 6th defendant. None of the reliefs prayed for in the suit can be granted. The quantum of profits shown is exaggerated and excessive. The suit is liable to be dismissed with costs.

7. The 6th defendant who is an assignee from the 1st defendant in respect of 40 cents of land filed a written statement virtually in terms of the written statement filed by the 1st defendant and praying for a dismissal of the suit.

8. The trial court framed the following issues for trial:

1. Whether Kunjipillai Amma was in sound state of mind while executing document No. 4860 of 66?

2. Whether first defendant had played any fraud, coercion, undue influence on deceased Kunjipillai Amma to execute the document?

3. Whether the decree in O.S. No. 318/69 and 554/69 are valid and binding on the plaintiff?

4. Whether the decrees in the above suits are liable to be set aside?

5. Whether the plaintiff is entitled to the declaration of title and possession over item No. 1 of the plaint schedule?

6. Whether the document No. 45 dt. 8-1 -1980 executed by 1st defendant in favour of 6th defendant is valid and binding on the plaintiff?
7. Is the above document liable to be set aside for the reasons stated in the plaint?
8. Whether the settlement deed No. 5343 dt. 19-9-1966 is valid and binding on plaintiff and defendants 1 to 3?
9. Is the plaintiff entitled to get partition of items 3 and 4? If so what is the quantum of share?
10. Is the plaintiff entitled to get mesne profits? If so, at what rate?
11. To what reliefs parties are entitled?

#### The Trial And Disposal

9. On the side of the plaintiff 5 witnesses were examined as P.Ws.1 to 5 of whom P.W. 1 is the plaintiff, P.W.3 is the 2nd defendant and P. W. 4 is the 3rd defendant. Exts. A-1 to A-36 were marked. On the side of the defendants two witnesses were examined and D.Ws.1 and 2 of whom D.W.1 is the 1st defendant. Exts. B-1 to B-17 were marked.
10. This suit was tried along with O.S. No. 79/1986 filed by the 1st defendant herein seeking a decree for specific performance in respect of plaint schedule item No. 1 against the plaintiff. After joint trial, the trial court as per common judgment and decree dt. 12-4-1991 decreed O.S. No. 78/1986 and dismissed O.S. No. 79/1986. Aggrieved by the decree passed in O.S. No. 79/1986, the 1st defendant filed A.S. No. 30/1992 before the District Court, Alappuzha. Aggrieved by the decree passed in O.S. No. 78/1986 (present suit), defendants 1, 4 and 5 filed A.S. No. 31/1992 before the District Court, Alappuzha. The 6th defendant also filed an appeal as A.S. No. 33/1992 against the decree passed in O.S. No. 78/1986. All the three appeals were jointly heard and disposed of by the District Court, Alappuzha as per common judgment dt. 29-9-1994 by which all the appeals were dismissed with costs. It is aggrieved by the judgment and decree passed in A.S. No. 31/1992 which was against the decree passed in O.S. No. 78/1986 that

defendants 1,4 and 5 have come up in second appeal.

(Editors' Note : Paras. 11 to 16 omitted being appreciation of evidence)

### What is Settlement Deed

17. Although Exts.A-2, A-3 and A-4 are all settlement deeds styled as 'dhananishchayadharam', all those documents are transactions of gift falling under Section 122 of the Transfer of Property Act. The T.P. Act does not define or specifically deal with 'settlement deeds'. The said word is, however, defined under the Kerala Stamp Act to inter alia mean a non-testamentary disposition in writing of movable or immovable properties made for the purpose of distributing the property of the settler among his family members or those for whom he desires to provide or for the purpose of providing for some person dependent on him. (Vide District Collector v. Shahul Hameed and Anr. 1991 (1) KLJ 530 and the judgment dt. 28-6-2006 by a Division Bench of this Court in A.S.589/1992. However, a gift envisaged by Section 122 of the T.P. Act is not restricted to members of the family of the settler or persons dependent on him. Ext.A-3 settlement deed does not reserve in the settler/ mother any right of revocation. Had there been any such right reserved and the deed was revoked in exercise of such right, then the position would have been different (Vide Subbegowda v. Thimmegowda : AIR 2004 SC2428 . In the case on hand, Ext.A-3 is claimed to have been revoked by the settler on the ground of fraud and misrepresentation by executing Ext.A-4 settlement deed. There cannot be any dispute, and indeed it was not disputed also before me, that the settlement deeds with which we are concerned in this litigation are gift deeds pure and simple falling under Section 122 of the T.P. Act.

### The 'Void-Voidable' Controversy

18. The evidence in this case is to the effect that Ext.A-3 gift deed executed by Kunjipillai Amma, the mother, was acted upon. In Ext.B-10 interlocutory order in O.S. No. 554/69 and in Ext.B-11 appellate order, the possession of the properties with the 1st defendant pursuant to Ext.A-3 settlement was recognised. The plaintiff examined as P.W.I has also admitted that the donees under Ext.A-4 subsequent settlement deed have not obtained possession of the properties settled thereunder

(see P.W.I-page 11). Then the further question is whether a gift deed after its acceptance by the donees could be revoked by the donor on the plea of nan est factum by executing another gift deed in which the earlier gift deed is cancelled on the ground of fraud and misrepresentation. It is true that Section 126 of the T.P. Act inter alia provides as follows:

A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded.

Save as aforesaid, a gift cannot be revoked.

This act of revocation of Ext.A-3 settlement deed in the present case is claimed to have been exercised by the mother, not by approaching the civil court on the ground of fraud and misrepresentation, but by executing Ext.A-4 settlement deed wherein after revoking Ext.A-3 settlement deed on the ground of fraud and misrepresentation, the mother claims to have made a revised allotment of the properties in favour of all her five children including the 1st defendant herein. Hence, the first aspect to be considered is as to whether it is open to a donor after having executed a gift deed which was acted upon by the donees, to execute another gift deed cancelling the earlier gift deed on the ground of fraud and misrepresentation and altering the allotment of properties under the first mentioned gift deed.

19. The execution of Ext.A-3 settlement deed by the mother is not disputed. Ext.A-2 is a registered document. There is a presumption that a registered document has been validly executed and the onus of proof will be on those who want to offset the above presumption (vide para.27 of Prem Singh v. Birbal 2006 (2) KLT 863 (SC). It is not the execution of the document that is assailed. What has been taken exception to is only the unequal distribution of the properties thereunder allegedly in disregard of the directions given by the mother. The healthy and sound disposing state of mind of the settler also could not be questioned since within one month of Ext.A-3 she had executed Ext.A-4 settlement deed and one year thereafter she had executed Ext.B-13 settlement deed. But the courts below had approached Ext.A-3 as if it were a Will. Such an approach has been disapproved in M. Rangasamy v. Rengammal : AIR 2003 SC3120 . There is no case for the

plaintiff that there was a fraudulent representation as regards the character of the document. Her only case is that there was a fraudulent representation as regards the contents of the document. If the fraudulent representation was with regard to the character of the document, then the document would be void and a suit for setting aside the document by recourse to Section 31 of the [Specific Relief Act, 1963](#) would be unnecessary. Vide *Ningawwa v. Byrappa* : [1968]2SCR797 . But where the fraudulent representation is with regard to the contents of the document, it is only voidable for which a suit for setting aside the document will have to be filed within 3 years as provided under Article 59 of the [Limitation Act, 1963](#). Even where the document is void, once a suit is filed for cancellation of the document as in this case, it would be governed by Article 59, which, if not attracted, the residuary Article 113 will apply (see 2006 (2) KLT 863 (SC) supra).

20. The position regarding the need for setting aside of a voidable alienation can be best illustrated by taking the case of a Hindu minor. The case of a Hindu minor would be an extreme case as it pertains to the property of a person under disability. Section 11 of the [Hindu Minority and Guardianship Act, 1956](#) ('HMG Act' for short) imposes a total ban on a de facto guardian of a Hindu minor to deal with the minor's property. The said provision reads as follows:

Defacto guardian not to deal with minor's property-After the commencement of this Act, no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being the de facto guardian of the minor.

It is only the minor's natural guardian, if alive and not incapacitated, who can deal with the property of such minor. The question as to who is the natural guardian of the minor has to be decided with reference to Section 6 of the HMG Act under which in the case of a legitimately born minor, ordinarily it is the father who is the natural guardian and the turn of the mother comes only after the father. In a case where the father of the minor is alive and not disqualified, it is incompetent for the mother to interpose herself as the guardian of the minor. Any alienation or disposal of the property of the minor by the mother acting as the guardian of the minor is unauthorised and totally devoid of any effect. Hence an alienation of the minor's property either by the mother or by a de facto guardian in contravention of Section

11 of the HMG Act will have to be treated as void. This statement of the law in the decisions reported in *Ayyappan v. Antony* 1978 KLT 534, *Danayi Gurumurthy v. Raghu Podhan and Anr.* : AIR1967 Ori68 , *Devineni Suseela v. Sivaramaiah* 1976 (1) Andh. W.R. 423 and *Chathu Chettiar v. Kanaran* 1983 KLT 888 stands approved by the decision of the Apex Court in *Madhegowda v. Ankegowda* : AIR 2002 SC215 . So, it is the natural guardian who is clothed with the power to deal with the property of such minor. Section 8 of the HMG Act sets out the power of the natural guardian of a Hindu minor. Such natural guardian, subject to the provisions of Section 8, has the power to do all acts which are necessary or reasonable or proper for the benefit of the minor or his estate. The natural guardian, however, cannot, without the previous permission of the court, sell any part of the immovable property of the minor. Any disposal of immovable property which is not necessary or reasonable or proper for the benefit of the minor or is without the previous permission of the court is voidable at the instance of the minor. The provisions of Section 8 are so devised as to protect the property of the minor completely even from the depredations of his parents (see *Pannilal v. Rajender Singh* (1993) 4 SCC 3). Thus, the power of the natural guardian of a Hindu minor is hedged in by certain statutory limitations as stated in Section 8 of the HMG Act and those limitations are incorporated therein for the protection and benefit of the minor. There was a sharp cleavage of judicial opinion on the question as to whether the alienation of the minor's property by the natural guardian without the previous permission of the court under Section 8(2) of the HMG Act is only voidable at the option of the minor or is void. There was also a divergence of judicial opinion on the question as to whether if such alienation was only voidable, then whether the minor could simply repudiate the transfer by some overt act without recourse to the civil court. But now, after the authoritative pronouncement of the Apex Court in *Viswambhar and Ors. v. Laxminarayan and Anr.* : AIR 2001 SC2607 and *Nangaliamma Bhavani Amma v. Gopalakrishnan Nair and Ors.* : (2004)8SCC785 and that of a Full Bench of this Court in *Ramadas Menon v. Sreedevi* : AIR2004 Ker126 , such an alienation by the natural guardian is only voidable at the option of the minor and this act of avoidance by the minor can only be by means of a regular suit for which the period of limitation is three years from the date on which the minor attains majority as provided under Article

60 of the [Limitation Act, 1963](#).

21. The provision in Section 126 of the T.P. Act enabling the revocation of a gift in the same manner in which a contract could be rescinded was made since the donor could not, but for the said provision, avoid the transfer by recourse to Sections 19 and 19A of the [Indian Contract Act, 1872](#). This is because those provisions of the Contract Act apply only to agreements. Reciprocity, which is the hallmark of an agreement, is absent in a gift. A gift is a gratuitous transfer which cannot be treated as an agreement for want of mutuality. That is presumably why an express provision was made in Section 126 of the T.P. Act. Therefore, even for revoking a gift, the provisions in the Contract Act pertaining to rescission of contracts will have to be resorted to. There cannot be the rescission of a contract by a unilateral act of repudiation or cancellation without the intervention of the court. The relevant Article governing suits for rescission of a contract is also Article 59, Column 1 of which reads as follows:

to cancel or set aside an instrument or decree or for the rescission of a contract.

Thus, in a case where, after the acceptance of the gift, if the donor wants to revoke the same by resorting to Section 126 of the T.P. Act, the donor will have to institute a suit for the same. However, if there is no acceptance of the gift, it may be permissible for the donor to cancel the gift or execute another gift deed before it is accepted by the donee.

### Res Judicata As A Bar To This Second Appeal

22. I will first consider the bar of res judicata raised against a consideration of this second appeal on merits. It is the dismissal for default by this court on 15-11-2002 of S.A. No. 732/95 filed by the present 1st defendant against the decree dismissing O.S. No. 79/86 which is put forward as a bar to this second appeal on the ground of res judicata. The suit O.S. No. 79/86 which was tried along with the present suit (O.S. No. 78/86) takes in only item No. 1 (1 acre in Sy. No. 19/IA) of the plaint schedule in the present suit. If issues common to both the above suits had been tried and disposed of and if the decree in one of such suits had become final, then of course the findings on such common issues will operate as res

judicata (see *Janardanan Pillai v. Kochunarayani Amma* 1976 KLT 279 (FB) and *Madhavi Amma Bhavani Amma and Ors. v. Velu Pillai and Ors.* : AIR1990 Ker144 . But in the case on hand O.S. No. 78/86 (the suit from which this second appeal arises) was for setting aside Ext.A-3 settlement deed and also for setting aside the decrees in O.S. No. 318/69 and O.S. No. 554/69 and for other reliefs in respect of 8 items of immovable properties. O.S. No. 79/86 filed by the 1st defendant herein was for specific performance of Ext.B-6 agreement dt. 10-1-1979 to sell the present plaintiff schedule item No. 1 against the present plaintiff. Apart from the fact that the cause of action for O.S. No. 79/86 was totally different from that of O.S. No. 78/86, the issues framed and decided were also not common. Under these circumstances I do not find any merit in the objection raised on the ground of res judicata regarding the sustainability of this Second Appeal. The said objection is overruled.

Whether The decrees In O.S. 318/69 And O.S. 554/69 Where Obtained By Fraud Or Collusion

23. It is only if the plaintiff in the present suit is able to prove that the decrees in the previous suits viz. O.S. No. 318/69 and O.S. No. 554/69 were obtained by fraud or collusion for any of the reasons put forward by her that the court in the present suit would be entitled to go into the merits of the respective claims in the previous suits (vide *Ram Chandra v. Firm Prabhu Lal* AIR 1927 Pat. 183. In other words, if the plaintiff in the present suit fails to establish that the decrees in the previous two suits were secured by fraud or collusion as envisaged by Section 44 of the Evidence Act, then it will be impermissible for the court in the present suit to consider the merits of the respective claims in the previous suits. Consequently, the decrees in those two previous suits will operate as res judicata to the present suit precluding the court in the present suit from examining the merits of the claim in the earlier suits.

24. The scope of Section 44 of the Evidence Act has been elucidated in a number of judicial pronouncements. Fraud, in order to avoid a judgment, must be extrinsic or collateral to the adjudication involved in the judgment and should not have been or deemed to have been dealt with by the court in the impugned judgment (see

Subramaniam v. Nagaramma and Ors. : AIR1963 Ker26 and Weavers Mills Ltd. v. Balkis Ammal and Ors. : AIR1969 Mad462 . Similarly, a contention that the claim urged by one of the parties was a false one or that he secured the decree by letting in false or perjured evidence, even if true, would not amount to fraud of the kind that would nullify the decree in the previous suit. The falsity or truth of the claim must be deemed to have been adjudicated by the court when it decreed the claim. Fraud affecting the validity of the decree must be actual positive fraud in the form of a meditated and intentional contrivance to keep the opposite party in ignorance of the real facts of the case of the case (vide : AIR1963 Ker26 - supra) If the previous suit or other proceeding were started with the object of injuring the opponent, there may not be any collusion in securing the judgment, order or decree. In order to avoid a decree on the ground of fraud, the fraud must be extrinsic to the proceedings before court - Yohannan v. Harikrishnan Nair : AIR1992 Ker49 . If the second suit practically amounts to a re-hearing of the first, the second suit should not be heard (see Bhikaji v. Balvant AIR 1927 Bom. 510. In a suit to set aside a decree on the ground of fraud, it is open to the court to consider the question as to whether the claim of the plaintiff in the previous suit was true or false only if the plaintiff is able to show that there was non-service of summons and the same is attributable to a fraud committed by the other party in the previous suit with the object of keeping the present plaintiff in ignorance of the suit and of preventing him from placing his case before the court (see Ramchandra v. Firm Prabhulal AIR 1927 Pat. 183. When the Court is asked to set aside a decree on the ground of fraud, the only issue for its decision is whether the decree was procured by fraud. For deciding that issue the court cannot sit in appeal over the impugned judgment or decree. An unsuccessful party also cannot be allowed to get round the rule of res judicata and prove that the judgment was wrong because the court came to a wrong conclusion on the evidence before it. For the purpose of Section 44 of the Evidence Act an ex parte decree stands on the same footing as a decree in a defended suit. Mere non-service of summons does not constitute fraud. The decree will be set aside only if it is proved to have been obtained by fraudulent suppression of summons. In order to get rid of a former judgment it is not sufficient for a person to prove constructive fraud (not deliberate). He must prove actual positive fraud, a meditated or intentional

contrivance to keep the parties and the court in ignorance of the real facts of the case and the obtaining of that judgment by such contrivance. A prior judgment cannot be upset on a mere general allegation of fraud or collusion. It must be shown how, when, where and in what way the fraud was committed. A party alleging fraud is bound to establish it by cogent evidence. Mere suspicion cannot be accepted as proof.

25. Except for the ipsi dixit of the 2nd defendant Nanikkutty Amma examined as P.W.3 that no summons was served on her and her brother Bhaskara Panicker in the previous suit, there was absolutely no material placed before the court to show that they were not served in that suit. A perusal of Ext. A-10 judgment and Ext.A-6 decree shows that Bhaskara Panicker and Nanikkutty Amma who were respectively defendants 2 and 3 in that suit were ex parte which presupposes that they were duly served. There is a presumption under Clause (e) of Section 114 of the Evidence Act that all judicial and official acts were duly performed. It was for the plaintiff in the present suit to show that as a matter of fact Bhaskara Panicker and Nanikkutty Amma, were not served with summons in that suit and such non-service of summons was attributable to a fraudulent conduct of the present 1st defendant. None of the above two children of Kunjipillai Amma had at any point of time raised a contention or filed petitions before court to avoid the decree in O.S. No. 318/69 on the ground that they were not duly served. The courts below were, therefore, egregiously in error in assuming that Bhaskara Pillai and Nanikkutty Amma were not duly served in O.S. No. 318/69.

26. Now coming to the execution of Ext.A-5 release deed and Ext.B-7 gift deed by the 1st defendant in favour of the present plaintiff and the present 3rd defendant respectively and the consequential joint statements (Exts.A-8 and A-9) filed by the present plaintiff and the present 3rd defendant withdrawing their contentions in O.S. No. 318/169, I fail to see as to how the said circumstance would amount to a contrivance calculated to keep the present plaintiff and the present 3rd defendant in ignorance of the contentions in O.S. No. 318/69. Both of them knew that the 1st defendant was seeking to uphold Ext.A-3 settlement deed and to set aside Ext.A-4 subsequent settlement deed. By no stretch of imagination could it be said that the present plaintiff and the 3rd defendant were kept in the dark about the scope and

progression of O.S. No. 318/69. Both of them were represented by counsel and in Exts. A-8 and A-9 joint statements, both the plaintiff herein as well as the 3rd defendant herein and also their respective advocates had affixed their signatures. I fail to understand as to how or in what manner were the present plaintiff and the 3rd defendant kept away from the court so as to infer that the present 1st defendant was stealing a decree behind their back. The courts below were virtually swayed by the fact that the allotment under Ext.A-3 was unequal and inequitable. When the fact remains that the 1st defendant herein filed O.S. No. 318/69 with the definite object of getting Ext.A-3 settlement deed upheld and Ext.A-4 settlement deed invalidated and the opposite parties, as evidenced by Exts.A-7, A-35(a) and A-36 written statements, were hotly contesting his claim, it cannot be said that the contestants did not know the nature and scope of the said litigation or that they were craftly disabled by the present 1st defendant from contesting that suit. All that apart, there is no dispute that the settler/mother who was the 1st defendant in O.S. No. 318/69 had fought the suit upto the last by even giving evidence as D.W.I. In spite of that in Ext.A-10 judgment, the court was not inclined to accept the mother's contention that Ext.A-3 settlement deed was brought about by fraud and misrepresentation. The court not only upheld Ext.A-3 settlement deed, but set aside Ext.A-4 subsequent settlement deed executed by the mother. Ext.A-10 judgment and Ext.A-6 decree have become final. I am, therefore, not inclined to accept the contention of the present plaintiff that the judgment and decree in O.S. No. 318/69 were obtained by fraud or collusion. The said judgment and decree were passed after a full contest by the parties who were very much aware of the rival contentions. If so, the said judgment and decree are not liable to be ignored or set aside on the ground that they were secured by fraud or collusion.

27. In the case of O.S. No. 514/69 filed by the mother herself for setting aside Ext.A-3 settlement deed and for upholding Ext.A-4 subsequent settlement deed, the same was also, after a contest, dismissed as per Ext.A-17 judgment and Ext.A-18 decree. It may be true that the court dismissed her suit inter alia holding that the decree passed in O.S. No. 318/69 was res judicata to the issue raised therein. It has already been held that the judgment and decree in O.S. No. 318/69 was not obtained by fraud or collusion. So it was binding on all fours on the parties thereto including the present plaintiff. If so, the dismissal of O.S. No. 354/69 was

also binding on the parties thereto including the present plaintiff. She cannot get rid of the decrees in both the suits on all or any of the grounds alleged by her. Suffice it to say that there is absolutely no foundation in the pleadings also in support of the contention that the decrees passed in O.S. No. 318/69 and O.S. No. 554/69 were vitiated by fraud or collusion.

#### Res Judicata As A Bar To The Present Suit

28. In the light of my findings that the judgments and decrees passed in O.S. No. 318/69 and O.S. No. 554/69 are not liable to be ignored or set aside on the ground of fraud or collusion, the findings rendered therein to the effect that Ext.A-3 was a valid settlement executed by the mother and that Ext.A-4 subsequent settlement deed executed by the mother was invalid and inoperative will operate as res judicata to the present suit. It is impermissible for the plaintiff to re-agitate the very same questions in the present suit.

#### Bar Of Limitation To The Present Suit

29. Ext.A-6 decree in O.S. No. 318/69 which is requested to be set aside in the present suit was passed on 23-9-1971. Likewise, Ext.A-8 decree in O.S. No. 554/69 which is also requested to be set aside was passed on 2-2-1972. The plaintiff was a party in both the aforesaid suits. Ext.A-3 settlement deed which is also sought to be set aside was executed by the mother on 22-8-1966. The present suit incorporating the above-mentioned prayers was filed on 20-5-1982. Ext.A-35(a) is the written statement in O.S. No. 318/69 filed by the present plaintiff who was the 5th defendant in that suit. She is shown as aged 41 years and employed as a teacher in a High School at Alappuzha. The specific contention raised by her in the said written statement is that the settlement deed dt. 22-8-1966 (Ext.A-3 herein) is void ab initio since it was one brought into existence by practicing fraud and misrepresentation on the mother and that in the subsequent settlement deed dt. 19-9-1966 (Ext.A-4 herein) the mother had also cancelled the earlier settlement deed. So, the plaintiff was very much aware of the contentions of the present 1st defendant who was the plaintiff in O.S. No. 318/69. Merely because the present plaintiff opted to withdraw her contentions consequent on Ext.A-5 release deed executed by the 1st defendant herein, it does not follow that

she was craftly kept out of contest. She cannot plead ignorance of what transpired in that litigation. This is particularly so when she was fully aware of the contentions of the plaintiff herein. It is significant to note that the mother was a contesting party throughout that litigation and she got worsted in that suit filed by the present 1st defendant. There is no case that the mother was also kept away from contest. Apart from the fact that the plaintiff herself will be bound by the decree in O.S. No. 318/69, since she is claiming her title under the mother, the decree passed in O.S. No. 318/69 binds her on all fours. With regard to the other suit, namely O.S. No. 554/69 filed by the mother, that was also dismissed after a contest and in that suit also the mother was examined as a witness. In the first place, as already discussed hereinbefore, there is no legally sustainable ground made out for avoiding the above decrees on the ground of fraud or collusion. Secondly, the explanation put forward in support of the inordinate delay in instituting the present suit is nothing but a pretense. When Ext.A-3 settlement deed was upheld and Ext.A-4 subsequent settlement deed was held to be invalid in two separate litigations with the plaintiff herein as well as the settler/mother on the party array, the plaintiff cannot be heard to say that she was innocently ignorant of what transpired. Her contention that it was while scrutinising the papers for preparing the written statement in O.S. No. 488/81 (i.e. O.S. No. 77/86) that she came to know of the fraud is nothing but a cock and bull story invented to get over the inordinate and inexcusable delay. I am, therefore, of the view that the present suit filed long after the expiry of the 3 years' period prescribed under Article 59 of the [Limitation Act, 1963](#) was hopelessly time-barred. The statutory mandate under Section 3 of the Limitation Act is imperative in its sweep and application and courts are bound to follow the mandate even if the bar of limitation has not been taken as a defence. It is, therefore, held that the present suit is barred by limitation.

Sans The Above Legal Hurdles. The Plaintiff's Case Examined On Merits

30. Even if the plaintiff were to surmount the aforementioned hurdles and seek a consideration of her case on the merits, I am afraid that plaintiff is still not entitled to succeed on the merits as well.

31. None of the circumstances highlighted on behalf of the contesting respondents is good enough or sufficient to hold that Ext.A-3 settlement deed is vitiated by fraud or misrepresentation. Just because the first defendant, the eldest son, accompanied the mother and presented the document for registration, it does not mean that he was the executant or that he was playing a prominent role behind the execution and registration of the document. There is the statutory endorsement unmistakably recorded on Ext.A-3 that the executant namely the mother admitted execution of the document. There was nothing strange or suspicious if the executant mother was helped by her eldest son who, on her own admission, was the person authorised to do the needful for the preparation of the instrument. Likewise, when Ext.A-1 is admittedly the prior title deed of Kunjipillai Amma, the settler, there was no necessity for her to refer to Ext.A-2 settlement deed in Ext.A-3 settlement deed for tracing her title to the properties. It is true that the properties dealt with under Ext.A-3 are those which she had retained to herself as per 'F' Schedule of Ext.A-2. But then, her title to those properties described in the 'F' Schedule to Ext.A-2 was indisputably Ext.A-1 settlement deed executed by her husband in her favour. There is nothing in Ext.A3 3 to infer an anterior settlement of properties prior to the execution of Ext.A-3. Similarly, just because two of the daughters were excluded from Ext A-3, the settlement thereunder does not become suspect. The courts below were approaching the document as if it was a testamentary disposition. Unequal or inequitable distribution of properties under a settlement deed which is a transfer inter vivos cannot by itself constitute a vitiating circumstance. I do not find anything strange or abnormal in the terms and the recitals in Ext.A-3 since they only indicate the confidence reposed by the mother in the eldest son. Exts. A-25 to A-32 letters are all letters sent by the 1st defendant to the plaintiff or to her husband. First of all, their correspondence will be complete only if the replies to those letters are also before Court. Secondly, far from evincing a prick of conscience or a guilty disposition, those letters sent by the first defendant to his sister and brother-in-law only reveal the disturbed mind of the brother over the conduct of close relatives in having prevailed upon the mother and poisoned her mind and an anxiety to see that the misunderstanding between close relations was removed once and for all.

32. While in contracts for sale, mortgage, lease, exchange etc. there is pecuniary consideration, there is no such consideration in the case of a gift. But the right of rescission on the part of the granter in the case of a gift is circumscribed by the same sort of circumstances such as fraud, mistake, coercion, undue influence, misrepresentation or the like as would operate to invalidate a contract. Except in the circumstances mentioned in Section 126 of the T.P. Act, a gift cannot be revoked. Paragraph 2 of the said section shows that a gift may be revoked as if it were a contract but not on the ground of want or failure of consideration. In other words, a gift may be revoked in the same manner as a contract may be cancelled on the ground of fraud mistake, coercion and undue influence, misrepresentation or a like reason. (See Behari Lall v. Sindhubala AIR 1918 Cal. 615). But, as already adverted to earlier, such cancellation can only be by recourse to a court of law unless the instrument is void ab initio in which case it does not require cancellation. The period of limitation for a suit for the above purpose is 3 years under Article 59 of the Limitation Act. Even where notwithstanding the fact that the document is null and void, if the person entitled to treat the same as such, institutes a suit for setting aside the same, then by virtue of the residuary Article 113 of the Limitation Act, such suit will have to be instituted within 3 years.

33. When a gift of immovable property has been accepted by the donees and they are in possession of the property, the fact that after making the gift the donors felt that it was a folly or imprudence or want of foresight on their part to have executed the deed of gift will not clothe them with the power to revoke the gift. (Vide Vannathi Valappil Janaki and Ors. v. Puthiya Purayil Paru and Ors. : AIR1986 Ker110 . The donor's own folly is no ground for revocation of the gift. A valid gift accepted by the donees can, on no account, be revoked. But if the document is not complete until registration the donor can revoke it. A reservation by the donor to himself the right of enjoyment during his life-time of the usufructs or profits of property gifted without retaining any power of alienation over it does not in any way affect the validity of the gift (See Kelan v. Govindan and 1969 KLT 415. A gift subject to the condition that the donee shall maintain the donor cannot be revoked under Section 126 of the T.P. Act for the failure of the donee to maintain the donor Tila Bewa v. Maria Bewa : AIR1962 Ori130 . Thus after an anxious consideration of the facts and circumstances of the case, I have no hesitation to conclude that

the plaintiff has miserably failed to make out any ground for ignoring Ext.A-3 much less setting aside the same on the grounds alleged by her.

### The Final Reliefs

34. What now survives for consideration is as to whether the plaintiff is entitled to any of the reliefs prayed for in the suit. As already noticed, the 1st defendant's suit, namely O.S. No. 79/1986, for specific performance of Ext.B-6 agreement in respect of plaint schedule item No. 1 stands dismissed and it has become final. This means that the plaintiff is, by virtue of Ext.A-5 release deed, the absolute owner in respect of one acre of land comprised in Sy. No. 19/IA described as item No. in the plaint schedule. If so, the 1st prayer in the plaint withi regard to the said item is only to be granted. Plaint schedule item No. 4(a) admeasuring 53 cents comprised in Sy. No. 23/7 was an item of property which was allotted to Bhaskara Panicker as per the B Schedule to Ext.A-3 settlement deed. Since as per the decrees passed in O.S. No. 318/69 and 554/69 Ext.A-3 settlement deed stands upheld and Ext.A-4 subsequent settlement deed stands set aside, the allotment of the above 53 cents in favour of Bhaskara Panicker cannot be sustained. Admittedly, the said Bhaskara Panicker died unmarried and issueless. If so, the said 53 cents of land will devolve on the plaintiff and defendants 1 to 3. Hence, the plaintiff would be entitled to 1/4th share over the said item with mesne profits. Thus the suit claim with regard to the said item also will have to be decreed.

35. Accordingly, the suit O.S. No. 78/86 will stand decreed in part in respect of plaint schedule item No. 1 declaring the title and possession of the plaintiff over the said item. A preliminary decree for partition of plaint schedule item No, 4 (a) is passed and the plaintiff shall be allotted 1/4th share thereof with mesne profits the quantum of which and the person liable for the same shall be decided in the final decree proceedings. The costs in the suit shall come out of the estate. The suit claim with regard to the remaining plaint schedule items will stand dismissed.

In the result this Second Appeal is allowed as above. However, in the circumstances of the case, there shall be no order as to costs in this appeal.

