

Rajamma Vs. Dr. V. Sukumar

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Court : Kerala

Decided On : Feb-09-2012

Judge : K.M.Joseph & a.M. Shaffique

Appeal No. : A.F.A.No.63 of 1997

Appellant : Rajamma

Respondent : Dr. V. Sukumar

Judgement :

K.M. Joseph, J.

This appeal is filed by respondents 3 to 6 who are the LR s of the first defendant in the suit and the first respondent in the appeal. On the death of the 3rd appellant additional appellants have been impleaded.

2. The appeal arises out of a suit for partition and separate possession of the plaintiffs' share with mesne profits, past and future.

3. There are four schedules to the plaint. Besides A, B and C-Schedule, D-schedule relates to movables. The trial court passed a preliminary decree for partition as follows:

"In the result a preliminary decree for partition is passed in the following terms:-

A. Plaint A schedule, B schedule items 1 to 3 and C schedule items will be partitioned by metes and bounds and plaintiffs 1 to 17 are allotted one half share, 1st defendant 1/3 share and 2nd defendant 1/6 share in the aforesaid properties.

B. The quantum of mesne profits to which the plaintiffs are entitled will be determined in the final decree proceedings and such quantum will be a charge over the share of the plaintiff items allotted to the 1st defendant.

C. Plaintiffs are at liberty to apply for passing of a final decree within 3 months from this date."

4. The appeal was carried against the said preliminary decree by the plaintiffs complaining that the trial court should have held that plaintiff A-schedule is obtained by Karthiayani Amma Sakha as per Ext.A2 partition deed. Learned Single Judge allowed the appeal in part and a preliminary decree for partition of plaintiff A-schedule was passed directing division of the same into 20 shares and allotment of one share each to plaintiffs 1, 3 to 17 and 1st defendant and further directed that the share of the deceased Karthiayani Amma, Gowrikutty Amma, Ramachandran Nair and Padma Bai will devolve on their heirs as directed in para 11 of the judgment. Para 11 of the judgment in A.S.147/1988 reads as under:

"11. After 1956 the succession will be according to the provisions of the Hindu Succession Act. Karthiayani Amma, plaintiffs 1 and 3 to 17, 1st defendant, deceased Ramachandran Nair and Gowrikutty Amma were members of the thavazhi. Thus there were 20 members in the thavazhi. Karthiayani Amma died in 1972 and her share devolved on her children Gowrikutty Amma, Ramachandran Nair and 1st defendant who were alive at that time. Ramachandran Nair died in 1973 and his 1/20 share will devolve on the 2nd plaintiff and 2nd defendant in equal moieties. Gowrikutty Amma died in 1980 and her 1/20 share will devolve on plaintiffs 1, 3, 9, 12, 13 and Padma Bai (another daughter). The 13th plaintiff died in 1986 without any heirs except plaintiffs 1, 3, 9, 12, 14 to 16 who are recorded as her legal representatives. Her share will devolve on them. Padma Bai died in 1974 and her share will devolve on plaintiffs 14 to 16. It therefore follows that in addition to the 1/20 share of the existing members, the shares of the deceased members will devolve as directed above."

This led to the filing of appeal by the LR s of the first defendant as already noted.

5. We are in this case called upon to decide the correctness of the decision in regard only to plaint A-schedule property. The parties to the suit are descendants of one Karthiayani Amma who had four children that is two daughters and two sons. Plaintiffs are the lineal descendants of Karthiayani Amma's daughter Gowrikutty Amma who died in 1980. Another daughter Lakshmi Amma died issueless. First defendant is one of her sons. Apart from the first defendant Karthiayani Amma had another son namely Ramachandran Nair who died in 1973 leaving behind the second plaintiff and the second defendant. As already noted, under the preliminary decree the court had directed division of one item of A-schedule with which we are also concerned among the children of Karthiayani Amma, that is, 1/3 share each to Gowrikutty Amma, Ramachandran Nair and first defendant. According to the plaintiffs, Karthiayani Amma had obtained the property under Ext.A2 partition deed dated 2.3.1092 (M.E). That was a partition deed executed by Lakshmikutty Amma, Karthiayani Amma and others. In Ext.A2 partition deed it is inter alia stated that Karthiayani Amma and her santhanams are to enjoy the A-schedule property. The property in question actually belonged to Madhavan, the father of Karthiayani Amma. Ext.A10 purports to be the sale deed executed by Madhavan in favour of his wife and two children in 1067 ME. This was before the Enactment of the Travancore Nair Act. The Travancore Nair Act came into force in 1925. Section 41 of the Travancore Nair Act (Regulation II) reads as follows:

"41. Property acquired by gift or bequest from the father or husband before Regulation 1 of, 1088 came into force shall, for the purpose of this Chapter, in the absence of- evidence to the contrary, be treated as the tarwad property of the donees or devisees and of their thavazhee.

6. Learned Single Judge reasoned that if Ext.A10 was atleast in part a gift, Section 41 must apply and it will constitute a tarwad property in so far it is a gift. It is found that acquisition was under the name Lakshmi Amma who was the eldest female member and Karanavathy of the tarwad and there is no evidence to show that she has any other source of income for self acquisition of any property and therefore

the gift made by Madhavan to his wife and children must enure to the benefit of tavazhi of Lakshmi Amma and lineal descendants. It is also found that if it is intended that only Karthiayani Amma is to be favoured by partition, it is unnecessary to mention that her children will be entitled to be in possession and enjoyment though they were not parties to the document. Learned Single Judge reasoned that in interpreting a document the social ethos of the parties have a great bearing. Therefore it may reflect their intention as to how the property should devolve and be enjoyed. The parties belong to Nair Community following marumakkathayam and the document came into existence at a very early stage before the crystallization of law of succession in the community. The court finally concluded by holding that A- schedule also belonged to the marumakkathayam thavazhi of Karthiayani Amma and it is liable to be divided among the members and thereafter proceeded to make observations in para 11 which we have already adverted to.

7. We heard Sri.R.D.Shenoy the learned senior counsel for the appellants. We also heard Sri.R.Harikrishnan and Sri.N.Asok Kumar on behalf of the respondents. Learned senior counsel for the appellants would submit that, the property admittedly belonged to Madhavan. He has executed Ext.A10 which was clearly a sale deed in favour of his wife and three children namely, Karthiayani Amma, Velayudhan Parameswaran and Lakshmi Parvathi for a price of Rs.250/-. The operative portion of Ext.A10 reads as under:

It is contended therefore that Ext.A10 cannot be construed as a gift. If Ext.A10 cannot be construed as a gift then Section 41 of the Travancore Nair Act would not apply in which case the parties to the sale deed took the properties as tenants in common and there is no question of applying the principles of marumakkathayam law and holding that the property enured to the benefits of the members of the tarwad. Next he would contend that in Ext.A2, on the death of Velayudhan Parameswarn the remaining vendees in Ext.A10 partitioned properties covered by Ext.A10 and other properties on 18.10.1916. A-schedule property therein was allotted to Karthiayani Amma. B-schedule property to Parvathy Amma and C-schedule to her mother Lakshmi Amma. It is also not in dispute that in Ext.A2 the allottee of B-schedule namely Parvathy Amma was to pay a sum of Rs.100/- each

to the minor sons of Velayudhan Parameswaran and B-schedule was also subjected to charge for the said amounts. He would submit that provision in Ext.A2 that A- schedule properties therein are allotted to Karthiayani Amma and children inter alia and B-schedule to Parvathy Amma and children only indicate that the respective allottees will have the absolute title to the property. In other words, the employment of the words 'santhanangal' would not create any right on persons who have no right in the property. In other words, he would submit that A-schedule was separate property of Karthiayani Amma and therefore Gowrikutty Amma had only 1/3 right as correctly found by the trial court. In this context he relied on the following decisions. (AIR 1929 Pat.591), (AIR 1961 Mad. 405), (1981 (2) SCC 585), (AIR 1962 Mad. 369), (AIR 1965 Mad.193) and (AIR 1990 Ker. 226).

8. In *Debi Saran v. Nandalal* (AIR 1929 Patna 591) a Division Bench of the Patna High Court inter alia held as follows.

"Consideration contemplated by S.122 is valuable consideration, that is consideration either of money or of money's worth. Consideration of an expectation of spiritual or moral benefit, or consideration of love and affection are not contemplated by S.122."

9. The decision In *Kulasekaraperumal v. Pathakutty* (AIR 1961 Mad. 405) is also relied on for the proposition that that consideration must be real and complete absence of consideration is a characteristic of gift. It is held as follows:

".....So long as the consideration is not unreal it is sufficient if it be of slight value only. Where in consideration of her enjoying the properties transferred the wife was not only made liable to pay the debts incurred by the husband but she also undertook the burden of a maintenance charge and to pay maintenance to the husband's mother the transaction does not constitute a gift but amounts to an alienation for value in favour of the wife."

10. In *Sonia Bhatia v. State of U.P.* (1981 (2) SCC 585) the matter arose from an order passed by the Prescribed Authority under the U.P. Imposition of Ceiling on Land Holdings Act, 1960 rejecting the claim of the petitioners based on a gift

executed by her grandfather. The High Court had found that the gift not being a transfer for consideration is to be ignored under the provisions of the Act. The Court held as follows:

"20. From a conspectus, therefore, of the definitions contained in the dictionaries and the books regarding a gift or an adequate consideration, the inescapable conclusion that follows is that 'consideration' means a reasonable equivalent or other valuable benefit passed on by the promisor to the promisee or by the transferor to the transferee. Similarly, when the word 'consideration' is qualified by the word 'adequate', it makes consideration stronger so as to make it sufficient and valuable having regard to the facts, circumstances and necessities of the case. It has also been seen from the discussions of the various authorities mentioned above that a gift is undoubtedly a transfer which does not contain any element of consideration in any shape or form. In fact, where there is any equivalent or benefit measured in terms of money in respect of a gift the transaction ceases to be a gift and assumes a different colour. It has been rightly pointed out in one of the books referred to above that we should not try to confuse the motive or the purpose of making a gift with the consideration which is the subject-matter of the gift. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial considerations cannot be called or held to be legal considerations as understood by law. It is manifest, therefore, that the passing of monetary consideration is completely foreign to the concept of a gift having regard to the nature, character and the circumstances under which such a transfer takes place. Furthermore, when the legislature has used the word 'transfer' it at once invokes the provisions of the Transfer of Property Act. Under Section 122 of the Transfer of Property Act, gift is defined thus: 'Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void.

21. Thus, Section 122 of the Transfer of Property Act clearly postulates that a gift must have two essential characteristics--(1) that it must be made voluntarily, and

(2) that it should be without consideration. This is apart from the other ingredients like acceptance, etc. Against the background of these facts and the undisputed position of law, the words, 'transfer for adequate consideration' used in clause (b) of the proviso clearly and expressly exclude a transaction which is in the nature of a gift and which is without consideration. Love and affection, etc., may be motive for making a gift but is not a consideration in the legal sense of the term....."

The Apex Court also approved the law laid down by the learned Single Judge in the decision of the Madras High Court which we have just referred and held as follows;"

24. The learned Judge has rightly pointed out that complete absence of consideration is the main hallmark which distinguishes a gift from a grant or for that matter other transactions which may be for valuable or adequate consideration. We find ourselves in complete agreement with the observations made by Jagadisan, J. in Kulasekaraperumal case and Sahay,J. in Devi Saran case which correctly represent the character and nature of the gift as contemplated by law....."

11. In Nagaraja Iyer v. Seethalakshmi Ammal (AIR 1962 Mad. 369) the word 'santhathi' fell for consideration. A settlement deed was executed granting a life estate to S vesting remainder to her issues. It is provided that in case S did not have any issue her mother M was to take the property absolutely. If S has got a male 'santhathi' it is provided that such male 'santhathi' was to get the property absolutely after S. If there was no such male santhathi, S's female santhathis will take property absolutely. S died issueless. S. Ramachandra Iyer, CJ held as follows:

"Held that what was intended to be given to S was only an estate for life. What was given to M was a vested remainder, the time of distribution being the date of S's death, which was liable to be defeated if at that point of time, there were descendants of S, whether such descendants be her own children or children of her children. If at the time of S's death any one answering the description of "Santhathi" of S existed, he or she would take the property absolutely. The gift

over in favour of M was on a mere failure of descendants of S at the time of her death and not on indefinite failure of issue. The point of time at which they should take was on the death of S. R's interest was liable to be defeated if there was any Santhathi of S living at his death. This contingency did not happen and the defeasance clause in favour of S's Santhathi never took place. "

12. In *Ramaswami v. Venkatammal* (AIR 1965 Mad.193) it was held as follows:

"In a partition deed, executed by a Hindu father A and his son B, it was provided that a certain portion of the property should be enjoyed by A with a right to create mortgages and lease but with no power of sale or gift, that beyond creating mortgages and leases, A were to execute sales or gift, such sales or gift would not be valid and if A were to marry again and get heirs by the second marriage, those heirs alone were to take A's share after his life-time after performing his obsequies and that if A were to marry but to have no male heir by that marriage, B should after A's life time perform his obsequies and take over A's share of property. B died followed by A. A had not married again. Before death A had made a bequest of his share to third person: Held that the arrangement between A and B was of a two- fold character namely, a partition and a settlement and what A took under the arrangement was a life estate with power to mortgage, lease etc., and therefore, B had vested remainder in A's share property. Hence, on A's death A's share would descend on B's heirs: Judgment by Veeraswami,J in S.A.No.752 f 1961, dated 3.7.1968 (Mad) Affirmed:ILR 18 Cal 164 (PC) and AIR 1962 Mad 369 Rel.on."

13. In *Thayyullathil Kunhikannan v. Thayyullathil Kalliani* (AIR 1990 Ker. 226) it is held as follows.

"Family arrangements are generally entered into for the purpose of the well-being and harmony, in the family. Thereby disputes are avoided, the honour of the family safeguarded and obligations morally binding on the members of a family are provided for. The factual existence of a dispute is not a sine qua non for the validity of a family arrangement or to justify its existence in view of the beneficial nature and effect of such arrangements. Avoidance of family disputes is only one of the many grounds which go to validate a family arrangement. Any arrangement which is for the benefit of the family generally or tends to the preservation of peace

and security in the family is sufficient to make it a family arrangement, valid and binding on the members. When there is a family arrangement binding on the parties, it would operate as an estoppel by preventing the parties, after having taken advantage under the arrangement, from resiling from the same, or trying to revoke it. Recitals in the document incorporating the family arrangement are also equally binding. Even an agreement dividing family property, though entered into under a misapprehension of the legal rights of the parties, (provided the misapprehension was not induced by any party to the agreement) will be supported and sustained as a family arrangement. The recitals in the document or arrangement are evidence as against the parties to the document. If it is a settlement deliberately made and parties have acted upon the document, the recitals on the faith of which the other parties have acted, induced on the strength of the facts, and the position adumbrated in the document, operate as an estoppel in favour of the parties."

14. On the strength of the said decision the learned senior counsel for the appellants would contend that the plaintiffs could not contend that the property would enure to the tavazhi when the property actually belonged to Karthiayani Amma on the strength of assignment in her favour also. When the children are mentioned they have right as such in the property. Therefore, it was like a family arrangement. But, there can be no basis in enlarging the scope of rights and the provision would only enure to the parties to the document (A2), that is to say, the rights will be limited to Karthiayani Amma and her children who were then alive. There could be no scope for applying the principle that being a marumakkathayi female, her children and children through the female line howsoever low will acquire birth right in the property. The point of time with reference to which the group of persons or santhathis are to get the property must necessarily be the date of execution of Ext.A2, he contends. We may also notice the decision in *Anrudh Kumar v. Lachhmi Chand* (AIR 1928 Allahabad 500). A Bench of the Court *inter alia* held as follows. " If there is any consideration in the shape of a promise to discharge the debt of the transferor, the transaction cannot *prima facie* be treated as a gift as a promise to discharge the liability of the transferor is a valid consideration."

15. In *Shakuntala v. State of Haryana* (1979 SC 843) the point which arose for consideration was whether the gifts of land on account of natural love and affection would be said to be transfer of lands for consideration. The Court *inter alia* held as follows."5. Section 122 of the Transfer of Property Act defines 'gift' as follows:-

"122. Gift' is the transfer of certain existing movable or immovable property made voluntarily and without consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee. It is therefore one of the essential requirements of a gift that it should be made by the donor 'without consideration'. The word 'consideration' has not been defined in the Transfer of Property Act, but we have no doubt that it has been used in that Act in the same sense as in the Indian Contract Act and excludes natural love and affection. If it were to be otherwise, a transfer would really amount to a sale within the meaning of Section 54 of the Transfer of Property Act, or to an exchange within the meaning of Section 113 for each party will have the rights and be subject to the liabilities of a seller as to what he gives and have the rights and be subject to the liabilities of a buyer as to that which he takes....."

16. In *State of Kerala v. Thomas* (1986 KLT 861), Justice K.T.Thomas (as his Lordship then was) dealing with a case under the Kerala Land Reforms Act. The question arose whether the transfer amounted to a sale or gift. In that case the Court *inter alia* held as follows:

"4."Gift" is not defined in the Act. Therefore, the ambit of that terms as understood in law must be first ascertained.It will be useful to refer to definitions given to that word in other statutes. S.122 of the Transfer of Property Act, 1882 defines a gift as follows:

"Gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee". (emphasis supplied).The Gift Tax Act, 1958 contains a definition of the word 'gift' in S.2 (xii) of that enactment:"

Gift means the transfer by one person to another of any existing movable or immovable property made voluntarily and without consideration in money or money's worth". (emphasis supplied). There appears to be no substantial distinction between the above two definitions contained in those two different enactments. Black's Law Dictionary (Fourth Edition) defines gift as a voluntary transfer of personal property without consideration (emphasis supplied). Webster's Third New International Dictionary defines gift as

"a voluntary transfer of real or personal property without any consideration or without a valuable consideration, as distinguished from a sale" (emphasis supplied) Volume XVIII of Words and Phrases (permanent edition) provides the following meaning for the word 'gift'. It is a voluntary transfer of property from one person to another without consideration or compensation" (emphasis supplied).⁵ Thus, either in lexicographical or in legislative exercises the cardinal ingredient supplied to "gifts" is the absence of consideration in a transfer of property. Love or affection or any such mental disposition made perspicuous in a transfer of property cannot be regarded as its consideration for, the mental propensity is only the motive or guiding spirit behind such transfers. Consideration is something which is of value in the eye of law (vide Black's Law Dictionary-Fourth Edition). Thus, if a transfer is made in return for something which can be counted in terms of money, it is not a gift. But in a transfer of property, when the transferor does not get anything in return which can be valued in terms of money, it is ordinarily a gift. Voluntariness of the transfer actuated by some mental inclination towards the transferee is, of course, one of the essentials of a gift. An instrument can be a gift deed, though sometimes it is a camouflaged differently. Similarly, the nomenclature employed in an instrument of transfer may show it to be a sale or a settlement or partition, and yet the real purport of it is only a transfer without consideration in which case it really is a gift. If there is recital in an instrument that the transfer is made for consideration, there of course is a presumption that the transfer is made for consideration. However, if the parties succeed in showing that the recital therein about consideration is not a true statement, evidence is admissible to prove that the transfer is only a gift. S.92 of the Evidence Act will not be a bar, in such cases, for proving the absence of consideration.

8. In this context, it is useful to make a reference to the observations of Bhat, J. in *Ponnu v. Taluk Land Board* (1981 KLT 780):

"Whatever be the nomenclature given by the parties to a transaction, a Court or Tribunal is entitled to go behind it and look into the real nature of the transaction. It is clear that too much importance should not be attached to the nomenclature of a document. Nomenclature of the document may at times conceal the real transaction. Nomenclature may be given with or without any motive or under a wrong understanding of the rights of the parties or of the law applicable to them. When the question regarding construction of such a document arises for consideration, one may have to look behind the facade or the covering and identify the essence and reality of the transaction."

10. By the two deeds involved in this case, the father has transferred the property to his sons. Though he mentions therein a sale consideration, he acknowledges receipt of part of it towards love and affection for the transferees and regarding the other part, he directs the transferees to discharge two of his antecedent debts. The TLB finds that the transferees had not paid off those debts, but the transferor himself paid off those debts. Thus in effect no consideration had proceeded from the transferor either before or at the time of or even subsequent to the execution of the two deeds. Judged from the standards discussed above, I hold that the two instruments can be treated as transfers made by means of gift deeds."

17. In *Bishundeo Narain Rai v. Anmol Devi* (AIR 1998 SC 3006) the Apex Court was dealing with a case where there was one conveyance and the seller again sold the property after canceling the first conveyance. The ground for cancellation of the first conveyance was that the purchaser had not paid the entire consideration. Therein the Apex court held as follows.

"Held, the recitals in the first sale deed unmistakably indicate conveying of title to the property absolutely for consideration as outlined; by virtue of the sale the purchasers were put in possession of the property conveyed, became entitled to the custody of the sale deed and other documents and enjoyment of the property by them. These factors satisfy all the requirements of absolute sale. The balance of consideration of Rs.235/- was admittedly deposited by the first purchasers in

Court. Thus, the entire consideration was paid by the first purchasers. Further, not depositing the sudhbharna bond amount of Rs. 6,249/- in Court would not be fatal to the case of the first purchasers. As the first purchasers had deposited that amount in terms of the decree of the trial Court. Therefore, it cannot be said that part of the consideration was not paid. In any event, as sale of suit property under first sale deed was subject to mortgage, it was for the vendee to discharge the mortgage debt so any default or delay in payment the said amount cannot be construed as non- payment of consideration. The recitals of first sale deed are unambiguous and that the parties have expressed no intention that unless the sudhbharna bond amount is paid, the title to the suit property will not pass to the vendee. Further the non-delivery of the registration receipt by the vendors to the first purchasers was due to subsequent developments, namely, execution of cancellation deed and second sale deed, so it cannot be said to indicate an intention which interdicts passing of title to the first purchasers under first sale deed. Thus it was not open to the vendors to unilaterally cancel said sale by executing second sale deed. Therefore the title to the suit property passed on to the first purchasers on execution and registration of first sale deed. F.A.No.68 of 1969. D/- 12-5-1980 (Patna) Reversed."

18. In *Asokan v. Lakshmikutty* (2008 (1) KHC 193) the Apex Court inter alia held as follows.

"13. We have noticed the terms of the deeds of gift. Ex facie, they are not onerous in nature. The definition of 'gift' contained in Section 122 of the Transfer of Property Act provides that the essential elements thereof are:

(i) the absence of consideration;

(ii) the donor;

(iii) the donee;

(iv) the subject matter;

(v) the transfer; and

(vi) the acceptance.

23. Could they now turn round and say that he was to fulfill a promise? The answer thereto must be rendered in the negative. It is one thing to say that the execution of the deed is based on an aspiration or belief, but it is another thing to say that the same constituted an onerous gift. What, however, was necessary is to prove undue influence so as to bring the case within the purview of Section 16 of the Indian Contract Act. It was not done. The deeds of gift categorically state, as an ingredient for a valid transaction, that the property had been handed over to the donee and he had accepted the same. In our opinion, even assuming that the legal presumption therefore may be raised, the same is rebuttable one but in a case of this nature, a heavy onus would lie on the donors."

19. Sri.R. Harikrishnan and Sri.N. Asok Kumar would contend that under Ext.A10 no consideration passed in favour of Madhavan who executed the document in favour of his wife and children. No price is paid it is contended. They would further contend that in respect of B-schedule of Ext.A2 there is the word 'santhathi' used even though actually there was no 'santhanam' in respect of the person to whom B schedule was allotted. This, according to them, reinforce their case that the parties who are undoubtedly marumakkathayis treated the property as tarwad property. It is further pointed out that under Ext.A10 Velayudhan Parameswaran the brother of Karthiayani Amma and Parvathy Amma was also a transferee/alienee. When the property was partitioned by A2 Velayudhan is not allotted any share. In fact, he is not a party even. Instead there is a direction to the allottee of B- schedule namely Parvathy Amma to pay a sum of Rs.100/- each to the minor sons of Velayudhan Parameswaran. This is a circumstance which clinches that the property was a tarwad property, it is submitted. Velayudhan Parameswaran died after Ext.A10 and before Ext.A2. Wife and children were not made parties to Ext.A2. At any rate it is also contended that necessarily it could be treated as Karthiayani Amma blending her separate property with tarwad property. It is also contended that at the time when A10 was executed the court may not lose sight of the nature of the relationship between the transferor and transferees, namely, the transferees were wife and children of the transferor. In particular it is emphasized that Karthiayani Amma was a minor. It is also emphasized that of the consideration of Rs.225/-

mentioned in A10, without doubt while there was a direction to transferee to discharge the debt due from the transferor to 3rd party the balance amount was clearly indicated as a gift in the deed itself. It is also contended that there is no evidence to show that transferee has actually discharged the liability which is referred in A10. No consideration has passed from the transferee under A10 to the transferor they submit. Therefore, A10 must be clearly treated as a gift. The points which arise for our consideration are:

i) Whether Ext.A10 can be treated as a gift?

ii) What is the effect of the words 'santhanam' in both A -Schedule and B-Schedule?

20. Undoubtedly, Ext.A10 is styled as a sale deed. The same is executed by Madhavan, the father of Karthiayani Amma in favour of Karthiayani Amma, her mother, brother and sister. There was a mortgage created by the transferor.

21. Certainly the fact that the brother was not given a share as such advances the case of the respondents that parties being marumakkathayis intended to be guided by the concepts which are relatable to the said system. Moreover, characterizing the giving of the amount of Rs.200/- towards 'puthravalsalyam' appears to detract from rights which would have otherwise appeared to be created under Ext.A10 in favour of the brother of Karthiayani Amma.

22. No doubt, the most important question is whether Ext.A10 can be treated as a gift. A gift is a transfer of property made voluntarily and without consideration and accepted by the transferee. Love and affection are usually the motives for making of the gift. The concept of consideration as embedded in Section 122 of the Transfer of Property Act is relatable to the elements which are found in Section 2 (d) of the Contract Act. It is no doubt in Ext.A10 the document is styled as a sale deed. The price is fixed at Rs.225/-. Of the sale clearly 1/3rd that is Rs.75/- shown as a gift. Therefore, the transaction in Ext.A10 represents gift partly as found by the learned Single Judge. As far as the portion of the consideration relating to the liability to discharge the mortgage is concerned, we are of the view that such a provision detracts from the indispensable elements of a gift. In fact, learned senior

counsel for the appellant sought to distinguish the facts in *State of Kerala v. Thomas* (1986 KLT 861). Therein, he would point out the findings at para 10 that the Taluk Land Board found that the transferees had not paid off those debts but the transferor himself paid off those debts and thus in effect no consideration proceeded from the transferor either before or at the time of or even subsequent to the execution of the two deeds. Unlike in the said case the learned senior counsel for the appellant would point out in this case there is no finding and there are no material also to enter into a finding that the amount directed to be paid to the mortgagee in discharge of debt was paid off by the transferor in Ext.A10 and therefore it could not be held that Ext.A10 is a gift within the meaning of Section 41 of the Travancore Nair Act. As against the same the learned counsel for the respondents would point out the circumstance, namely, the relationship between the parties, the age of Smt.Karthiayani Amma, the absence of any source of income as such to contend that the amount would have been paid off only by the transferor. It may not be possible for us to enter into a positive finding in favour of the respondents that materials on record would show that the amounts were paid off by the transferor. In fact, apparently, matter was not thought of on the said lines before the trial court. The provision by which the transferees were obliged to pay off the amount to the mortgagee though militates against the transfer being a gift completely, it is composite transfer creating a gift also. It would therefore in our view attract Sec.41.

23. Moreover we must in this case necessarily consider the effect of parties to Ext.A2 partition deed providing that A-Schedule and B-Schedule are allotted to the allottees concerned with the 'Santhanam'. No doubt, it is the contention of the learned senior counsel for the appellants that in so far as the persons other than the transferees under Ext.A10 are concerned they had no right. The conferment of any right upon them could at best only be on the basis that Ext.A2 is a family arrangement, but, the benefit of family arrangement must go only to those persons who answer the description of 'Santhanam' (children) at the time of execution of Ext.A2, it is submitted. In other words, only those of the children of Karthiayani Amma who were alive at the time of Ext.A2 could claim the benefit of allotment of A- Schedule property under Ext.A2 partition deed, it is submitted. The argument appears to be fairly appealing particularly in the light of the decision of the Madras

High Court which the learned senior counsel for the appellant canvasses before us in this regard. But, here we must not overlook the local context and the law followed by the parties. We feel we may lean in favour of the view which is compatible with the tenets of the customary law namely 'Marumakkathayam'. Under Marumakkathayam the property passes in the female line howsoever low and birth right is given to those in the female line in the tarwad property till the passing of Hindu Joint Family Abolition Act 1976 whereunder the joint family itself came to be abolished. No doubt, as far as the argument based on blending of individual property of Karthiayani Amma in family property is concerned it is a case of the learned senior counsel for the appellants that there is no such pleading or case. However, we must notice that while in the case of Karthiayani Amma she had children, in the case of allottee of B- Schedule a sister of Karthiayani Amma she had no children. Yet the parties chose to use the word 'Santhanam', that is to say, the property was allotted to a party mentioned in Ext.A2 along with her 'santhanam' though none of them were alive. It does not give an indication that the parties intended that the property must be impressed with characteristics of tarwad property in keeping with the tenets of the 'Marumakkathayam' law. We must also bear in mind the decision of this Court in Narayani Amma v. Parameswaran Pillai (1963 KLT 630) wherein a Bench of this Court held that the expression 'santhathi' which corresponds to 'santhanam' means not children or issue only but imports succession or heir ship. We also notice that learned Single Judge has considered the social ethos and the intention of the parties. We are of the view that the view taken by the learned Single Judge therefore that all lineal descendants of Karthiayani Amma in the female line of succession who constitute a tavazhy are entitled to share does not require interference. Therefore, the upshot of the discussion is that we agree with the view taken by the learned Single Judge and we dismiss the appeal. However, the parties are directed to bear their respective costs.