
(1985) 02 KL CK 0014

In the High Court Of Kerala

Case No : A.S. No's. 193 of 1978 and 121 of 1980

Fatima Sarohini Suresh and Others

APPELLANT

Vs

K. Saraswathi Amma and Others

RESPONDENT

Date of Decision : 01-02-1985

Acts Referred:

Transfer of Property Act, 1882 — Section 10, 11, 12, 13, 14

Citation : AIR 1986 Ker 56

Hon'ble Judges : K. Bhaskaran, Acting C.J.; M.P. Menon, J

Bench : Division Bench

Advocate : P. Sukumaran Nair, A.K. Chinnan and S. Soman, for the Appellant; R. Krishnan Nair, P.S. Biju, T.R.G. Warriyar and R. Girijamma, for the Respondent

Final Decision : Dismissed

Judgement

M.P. Menon, J.—The short but interesting question in these two appeals is about the construction of Ext.A2 settlement.

2. One Walter Rose died on 24-6-1969 leaving behind his widow Mabel, two sons Suresh and Mahesh, and two daughters Hasheela and Jamila. Under the Travancore Christian Succession Act all the five were entitled to shares in the properties of the deceased, with the difference that the share of the widow would be limited to a life interest, the remainder devolving on the others on her death. Instead of effecting a partition on the above lines, however, Mabel and her children entered into Ext.A2 agreement on 1-9-1969 settling the properties in a different manner. Mabel was not interested in getting her share; the properties were therefore divided into four equal shares, scheduled as A, B, C and D, The Items in B, C and D schedules were set apart absolutely to Mahesh, Hasheela and Jamila respectively. A-schedule allotted to the eldest son Suresh consisted of two items. The first (13 cents) was to be retained by Mabel, with a right to take its income, till the marriage of the youngest daughter Jamila; and after her marriage, Suresh was to step into his mother's shoes with a right to enjoy it during his lifetime. The second item (7 cents with a building) was also to be

retained by the mother during her lifetime, Suresh getting it only after her death, with a right to take income during his lifetime. He could not encumber or alienate items (1) and (2) at any time, and after his death, they were to devolve successively on his descendants.

3. However, between 1972 and 1975, Mabel and Suresh executed a series of documents, including release-deeds, purporting to transfer all their rights in item (2) of the A-schedule in favour of Mahesh. And Mahesh sold those rights to one Saraswathi Amma. Sujit, son of Suresh, thereupon instituted O.S.No. 182 of 1975 challenging the validity of the assignments made by his father and grandmother. Disputes arose between him and Saraswathi Amma who, in turn, instituted O.S.No. 184 of 1975 for declaration of title and recovery of possession. The Court below dismissed O.S.No. 182 of 1975 and decreed O.S.No. 184 of 1975. That is how the two appeals have arisen.

4. Mr. Sukumaran Nair for the appellants contends that Mabel and/or Suresh had obtained only a limited interest in the property under Ext. A2 deed i.e. an interest restricted in its enjoyment to the owner personally, and that such an interest was not transferable at all, in view of Section 6(d) of the T. P. Act. Mr. T. R. G. Warder for the respondents disputes this position and asserts, in line with the view taken by the Court below, that Suresh had obtained absolute rights in the item under Ext. A2 deed, and that the clause restraining alienation was void. The result therefore turns on the construction of Ext. A2, and it is common ground that if the view taken by the Court below is found to be right, the appeals have to fail.

5. Now, the parties to Ext. A2 were Mabel, Suresh, Mahesh, Hasheela and Jamila in that order. The preamble recited that all the parties were in favour of putting an end to "joint rights" and becoming separate, and that the agreement was intended to give effect to this common intention*. The first operative clause provided that as the widow was not desirous of taking a share, the properties would be divided into four and allotted to the four children of Walter Rose as set out in Schedules A to D. Then followed the restrictive clauses concerning items (1) and (2) of A schedule allotted to Suresh, a provision that schedules B, C and D could be enjoyed by Mahesh, Hasheela and Jamila with absolute powers of disposition, and a further provision that all the four could obtain separate mutation in their names. Mabel was responsible for payment of tax in respect of item (1) of A-schedule so long as she was in possession; as regards item (2), the liability throughout was that of Suresh. Ignoring other minor details, the final provision was that the parties were giving up their joint rights in the properties in accordance with the agreement.

6. The appellants, as already noticed, contend that under Ext. A2 agreement, Mabel and Suresh had obtained only rights of personal enjoyment in respect of the A-schedule items, and that those rights were not transferable. Emphasis is

placed on the clause authorising Suresh only to take the income from the items during his lifetime, and requiring him to leave them unencumbered for the benefit of his descendants. With regard to the properties allotted to the other children, the agreement had made a specific provision that they could take them absolutely; but there was no such provision in respect of the A-schedule items allotted to Suresh. The right to obtain mutation was not decisive of the interests taken, in the properties. All the surviving members of Walter Rose's family were parties to Ext.A2, and it was their common intention that the A-Schedule items should always remain with the family. The widow had agreed to give up her share, and the other three children had agreed to forego their fights in the remainder of that share, on the distinct understanding that the properties would be dealt with only in accordance with the terms of Ext. A2. It was not a case of Suresh voluntarily imposing restrictions on his share; the restrictions were imposed at the request and desire of all concerned, and they rested on common consent. Such consent would not have been given, and no agreement would have been made, if the others were aware that Suresh was to get anything more than a right of personal enjoyment, it is contended.

7. In our opinion, it will be inappropriate to construe Ext. A2 in the background of the Travancore Christian Succession Act, and by reference to the manner in which the properties would have devolved thereunder, if the agreement had not been made. Despite the provisions of the Act, the parties were free to make their own arrangements in regard to the properties to which they had succeeded. Ext. A2 was such an arrangement, and the proper course would be to gather the intention of the parties from its terms and nothing else.

8. Turning to those terms, therefore, what we find is that Ext. A2 had opened with the recital that its object was to put an end to the "joint rights" in respect of the properties, and had ended with the declaration that the object was being achieved by the execution of the document. There could therefore be no doubt that the intention of the parties was to divide the properties of Walter Rose into four, three of the children walking away with their separate shares, and Suresh taking his share subject to the conditions specified. The division and allotment was effected by the same clause, namely, the one described "as the first operative clauses" in para (5) above ; the properties were to be divided into A, B, C, and D schedules for the purpose of being allotted to each separately. The expression* was applicable alike to all the allotments, and if it meant that Mahesh, Hasheela and Jamila could get their shares with certain incidence, Suresh was also entitled to take his share in a like manner. If the document had stopped there without the restrictive clauses that followed, all the four would have taken shares of the same nature or character. The circumstances that such clauses were added in respect of one of the shares only could not have affected the position, if the clauses were otherwise inoperative. The real question therefore is whether the restrictive clauses could be given effect to in law. If not, Suresh should be found to have taken his share in the same manner as the others did. In other words, the intention of the parties was to become separate by allotment of separate-

shares to each of the children, one among whom alone was to take his share subject to the restrictions specified.

9. What then were the restrictions? They were two-fold: (i) Suresh could not encumber or alienate the two items comprised in his share, and (ii) the items should devolve on his descendants for successive generations. The trial Court held that the first restriction was void in view of Section 10 of the T.P. Act; and the agreement is that the said provision could not apply to partitions or family arrangements which do not really involve transfers. A number of decisions were cited in support of the provisions that Section 10 of the T.P. Act could not apply to partitions or settlements; but there are also decisions which hold that though not in terms, the principle underlying the Section could apply to such arrangements also. In Thattaliyath Panchali and Others Vs. Cheruvari Panniyodan Manni and Others, Full Bench of this Court noticed that there was controversy over the question whether partition would amount to transfer, but preferred to take the view that it would not. It was however observed : --

"It is true that the preponderance of authority is in favour of a partition being treated as a transfer for the purposes of Section 53 of the T.P. Act, 1882- The correct view, as pointed out by Mulla, should be that a partition is not a transfer and, therefore not strictly within that section; but that the principle of the section will apply to a fraudulent partition, the object of which is not merely to give a sharer his rightful shares in the family property, but to effect the partition in such a way that such sharer would be able to defeat the creditor?."

In The Trichinopoly Varthaga Sangam, Limited Vs. T.N. Shanmughasundaram, Full Bench of the Madras High Court however applied S. 10 of the T.P. Act to the case of a partition. According to the Patna High Court (Jatru Pahan and Another Vs. Mahathma Ambikajit Prasad and Another, partition does not involve any transfer of property, but the Bombay High Court (Jagannathpuri Guru Kamaleshwarpuri Vs. Godabai and Another, has taken a different view. We think it will not be inappropriate to proceed on the basis that Sections 10 - 14 of the T.P. Act and the corresponding provisions of the Indian Succession Act are but statutory recognition of principles even otherwise well-settled. To impose a total restraint on transfer of property or to impose rules which keep it out of circulation for ever offends public policy, irrespective of whether such conditions are imposed by a deed of transfer, a will or a simple contract. A contract opposed to public policy is unenforceable; and in this view of the matter, the restrictive clauses in Ext. A2 have to be held as inoperative. If that is so, the conclusion must follow that Suresh had taken his share in the same manner as the others had taken theirs.

10. In Ragunath v. Dy. Commr. AIR 1929 PC 283. A had bequeathed properties to P as "my heir and successor" subject to the condition and P could not transfer them they were to pass to his successors "without division and distribution" so that the estate always remained with the family. The Privy Council held:-

"Their Lordships are of opinion that the words in the will "that the estate shall vest in Partab" and that he shall be the testator's "heir and successor" are clear dispositive words creating an absolute estate of inheritance in Partab, and they are further of opinion that the various clauses referred to above which were to come into operation after he had so inherited, must be regarded as an attempt to impose repugnant conditions upon the estate so created and are, therefore, void."

The provisions of Ext. A2 appear to be similar in so far as they relate to the allotment of A-schedule; they have to be understood as allotting a share to Suresh and then creating conditions repugnant to the estate so created. In other words, he had taken it like the others with power to transfer.

The appeals are accordingly dismissed, but without any order as to costs.