

(1992) 01 KL CK 0005
In the High Court Of Kerala
Case No : C.M.A. No. 175 of 1985

Kadiya Umma and Others

APPELLANT

Vs

Mayankutty and Others

RESPONDENT

Date of Decision : 06-01-1992

Acts Referred:

Evidence Act, 1872 — Section 68

Citation : (1992) 1 KLJ 742

Hon'ble Judges : P.K. Shamsuddin, J

Bench : Single Bench

Advocate : V.R. Venkitakrishnan and K.T. Sankaran, for the Appellant; V.P. Mohankumar, for the Respondent

Final Decision : Allowed

Judgement

1. Defendants 1 to 5 in O. S-No: 51 of 1981 on the file of the Sub Court, Manjeri are the appellants. Suit was for partition. Briefly stated, facts which are essential for determination of the above appeal are as follows: The properties described as Schedule II-B in the plaint originally belonged to one Assankutty. Assankutty died in 1968 without any male issue. Defendants 1 to 5 are his daughters and Kathiyakutty Umma was his wife. According to the plaintiff, defendants 1 to 5, Kathiyakutty and Assankutty's brothers, 1st plaintiff, 10th defendant, 2nd plaintiff's father deceased Mohammed and one Ahammad, father of defendants 11 and 12 are the legal heirs of Assankutty, who are entitled to succeed to the assets of deceased Assankutty. They also alleged that they came to know of the execution of Exts. B2 and B3 gift deeds in favour of defendants 1 to 5 only through the reply sent by defendants 1 to 5. According to them, during the lifetime of Assankutty, plaint schedule items were not given possession and till his death, Assankutty was in possession and enjoyment of plaint schedule property and was residing in the building in item 2 of plaint schedule property. They also alleged that the gift deeds did not take effect and they are not binding on them and if any such gift deeds were executed by Assankutty in favour of

defendants 1 to 5, it was done under fraud, coercion and undue influence with a view to defeat the legitimate rights of the plaintiffs and other legal representatives.

2. Defendants 1 to 5 in their written statement contended that since items 1 and 2 were gifted to them under Exts. B1 and B3 and they took possession pursuant to those documents, plaintiffs were not entitled to any relief.

3. The trial court found that Exts. B1 and B 3 gift deeds were executed by Assankutty, that they were not vitiated by fraud, undue influence or coercion and that therefore the plaintiffs are not entitled to partition. In that view of the matter, the suit was dismissed.

4. On appeal to the District Court, learned District Judge found that execution of gift deeds has not been proved in accordance with the provisions contained in Section 68 of Evidence Act. In that view of the matter, the lower appellate court set aside the judgment and decree of the trial court and remanded the matter to consider the other relevant issues such as shares, etc. Aggrieved by the judgment and decree passed by the lower appellate court, the defendant 1 to 5 have filed this C M. Appeal.

5. Sri V. R. Venkatakrishnan, learned counsel for appellants submitted that in view of Proviso to Section 68 of Evidence Act, no formal proof of execution is required in the instant case and therefore the order or remand passed by the court below holding that item 1 is particle is unsustainable in law.

6. Section 68 of Evidence Act states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence. However, the Proviso to the said Section, which was introduced by Act 31/1926 lays down that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of Indian Registration Act, 1908 (Act 16/1908) unless its execution by the person by whom it purports to have been executed is specifically denied.

7. Learned counsel for appellants submitted that there is no specific denial of execution of the document by Assankutty. Learned counsel took me to para 5 of the plaint, which has been relied on by the appellate court and argued that the plea made therein cannot be understood as plea of specific denial. In para 5 of the plaint, it is stated that plaintiffs are not aware of the existence of gift deeds as stated by defendants 1 to 5. It further states that during the lifetime of Assankutty, he did not give possession of the property to any person and Asaokutty's rights have not been obtained by any person and Assankutty continued to be in possession and enjoyment of the property. It is further averred that till Assankutty died, he resided in the building in item 2 and that if there are any gift deeds as stated by the defendants, they were obtained by

misrepresentation, undue influence and fraud and they were not executed in good faith and there was no reason for execution of such gift deeds.

8. This leads me to the question whether there is specific denial of the execution as contemplated in the Proviso to Section 68 of Evidence Act, in the averments referred to above. In Aiyar's Judicial Dictionary, 9th Edition, page 912, the meaning given to the word "specific" is what is precise, exact, definite and explicit. Concise Oxford Dictionary gives the meaning definite and distinctly formulated. In New Webster's Dictionary of the English Language, the meaning given to the word "specific" is explicit or definite, to be specific In one's statements, specified, precise or particular, etc.

9. It was pointed out in the ruling of a Division Bench of Nagpur High Court in Dashrath Prasad Bajooram v. Lallosingh Sanmansingh (AIR 1951 Nag. 343) that Proviso to Section 68 of Evidence Act speaks of specific denial and. it must mean something over and above a general denial.

10. A Division Bench of this court had occasion to consider the meaning of the expression "specific" used in the Proviso to Section 68 of Evidence Act in Kantian Nambiar v. Narayani Amma & ors (1984 KLT 855). It observed:

"Specific" means with exactness, precision in a definite manner. It is clear that something more is required to connote specific denial in juxtaposition to general denial. Specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. It means not only that the denial must be in express terms but that it should be unqualified, manifest and explicit. Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executant cannot be gathered, for the denial contemplated in the proviso.

In the case before the Division Bench, in para 4 of the written statement, the defendants alleged that it was not true that Ananden Nembiar (the donor in that case) gave a gift to Lakshmi Amma (the donee in that case) and the plaintiff obtained that right from Lakshmi Amma, that to the knowledge of defendants 7 to 12, Anandan Nambiar with his free will and volition had not made any gift deed and that the alleged gift deed is a document created by exerting undue influence. In conclusion, it was stated that the document is not legal and valid. It was argued that a reading of para 4 of the written statement as a whole would show that there is a specific denial of the execution of the gift deed. That argument was repelled by the Division Bench saying that denial of execution is not express, definite and manifest.

11. In Vedachala Chettiar Vs. Ameena Bi Ammal and Others, , a Full Bench of the Madras High Court held that an allegation that the mortgage was a sham and nominal transaction entered into in order to defeat the creditors would not amount to a specific denial of execution,

12. In Yakubkhan Daimkhan Serguro Vs. Guljarkhan Abdulkhan, a Division Bench

of Bombay High Court held that where the execution of a document is not specifically denied, it is not strictly necessary for the party proving that document to call an attesting witness in proof of execution of it. So also, a Division Bench of the Allahabad High Court in Amir Husain and Others Vs. Abdul Samad and Others held that where the mortgagor has merely not admitted execution or attestation of the document and has put the mortgagee to proof, then there is no specific denial of execution.

13. Learned counsel for contesting respondents placed great reliance on the decisions of the Supreme Court in Bhagwati Prasad Vs. Shri Chandramaul, and Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, , but in my view, those decisions have no application whatsoever to the facts of this case. They are not rendered on interpretation of Proviso to Section 68 of Evidence Act. It only says that pleadings should be liberally constructed. Proviso to Section 68 speaks of specific denial and as such, no question of adoption of liberal construction arises in the case where execution of document is under challenge.

14. I have carefully gone through the pleadings in para 5 of the plaint on which great reliance was placed by counsel for plaintiffs, but I am unable to see anything in the pleading which can be described as specific denial of execution of the documents. The plea that plaintiffs were not aware of the execution of the documents would not amount to specific denial of execution. There is no other pleading, which can be described as specific denial of execution. The decisions referred to above fully support this view. In the circumstances, in my opinion the lower appellate court went wrong in holding that since there is want of, proof of execution, the impugned gift deeds should fail.

15. DW 1 was examined on behalf of defendants 1 to 5. He is the husband of 2nd defendant. He gave evidence that as per Ext. B1 gift deed, item I was actually given possession to defendants 1 to 5 and they took possession and started enjoying the property as their own even during the lifetime of Assankutty, that with regard to item 2, as the donor had reserved the rights to take income from the property and reside in the property it was not given actual possession to donees during the lifetime of Assankutty, but there was bonafide intention to give possession of the property gifted to them and that the donees were paying the tax. Exts. B6, B6(a) and B 10 series show that possession was made over to donees, It can also be seen that after the death of Kathiyakutty Umma, defendants 1 to 5 partitioned the properties under Exts. B2 and B5. However, DW 1 admitted that he did not see Assankutty signing the document It is on the basis of this statement of DW 1 that the lower appellate court found that there is no proof of execution of Exts. B1 and B3. As indicated above, as there is no specific denial of execution, no proof of execution is necessary. It may be also pointed out that while the matter was pending, plaintiffs withdrew their contention relating to item 2 and it was conceded that gift took effect in regard to that item.

16. DW 1 clearly stated that possession of item 2 was made over to the donees. It is open to a donor to reserve the right to reside in the property and also to take usufructs from that property. Such reservation will not amount to failure to give delivery as required by Muslim Law to constitute a valid gift. In view of the reservation, actual delivery was not possible in respect of item 2. It is only such possession as the subject of the gift is susceptible of that is contemplated. It can be either actual or constructive. Where physical delivery of possession is not possible such possession as the property admits may be delivered (See Mulla, Principles of Mohamedan Law, 19th Edition, pages 118-120). In the instant case, plaintiffs conceded that the gift relating to item 2 took effect and therefore it is not really necessary for me to consider whether there was delivery of possession in regard to Item 2.

17. As regards gift relating to item 1, there is a categorical statement in the deed that delivery of possession was made over. In *P. Kunheema Umma Vs. P. Ayissa Umma and Others*, a single Judge of this court held that a categorical statement in the gift deed that possession was made over to the donee coupled with payment of tax by the donee after the execution of gift deed and before the death of donor is indicative of the fact that possession was made over. So also in *Alaviv. Ammukutty* (1984 KLT(SN) Page 61), another learned single Judge of this court has held that where the deed of gift itself recites that the donor has given possession of property gifted to the donee, such recital is binding on the heirs of donee. I am in respectful agreement with the views expressed in the above decision. It therefore follows that there is ample evidence in the case to show that actual possession was made over in respect of item 1.

18. In this connection, it is also profitable to refer to the evidence of PW 1. He is the 2nd plaintiff. He stated that he did not know whether or not the gift deed relied on by defendants 1 to 5 have taken effect or under what circumstances, the gift deeds were executed. He also stated that he did not know from where the gift deeds were executed. He also said that he did not know who all took possession of the property in accordance with gift deeds. This evidence of PW 1 would clearly show that the plaintiffs are not in a position to dispute the genuineness of gift deeds. Though they pleaded that they were brought into existence by misrepresentation, undue influence and fraud, there is absolutely no material on record to substantiate these allegations.

19. Learned counsel for respondents submitted that if this court takes the view that the gift deeds do not fail for want of execution, the matter has to be remitted back to the lower appellate court for considering other contentions raised by plaintiffs, namely, that the documents were brought into existence by misrepresentation, fraud and coercion. Though such pleadings were raised by plaintiffs, no evidence has been adduced by them to substantiate this contention. The burden is heavily on plaintiffs to prove those averments. I have already referred to the admission of PW 1 that he did not know whether documents have come into force and under what circumstances the documents came into force or

who are the persons who took possession of the property. There is no material whatsoever to come to the conclusion that the documents were brought into existence by misrepresentation, fraud or undue influence. In the circumstances, I do not think that I will be justified in remitting the matter back to the lower appellate court for considering the above question. The above discussion would show that the finding that the gift deeds have failed cannot be sustained. It follows that the order of remand passed by the lower appellate court is liable to be set aside and the judgment and decree of the trial court are liable to be restored.

In the result, C. M. Appeal is allowed, the judgment and decree of the lower appellate court is set aside, the judgment and decree of trial court is restored and the suit is dismissed. The parties will bear their respective costs.