

(2007) 07 KL CK 0035
In the High Court Of Kerala
Case No : S.A. No. 868 of 1994C

Kottangodan Mohammed and Others	Vs	APPELLANT
Cherathodi Kunhapputty and Others		RESPONDENT

Date of Decision : 06-07-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2007) 3 ILR (Ker) 541 : (2007) 3 KLJ 162

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : K. Rakachandran and Jayasree S, for the Appellant; T. Krishnanunni, for the Respondent

Final Decision : Dismissed

Judgement

M. Sasidharan Nambiar, J.—Appellant instituted O.S. 4 of 1985 before Munsiff Court, Parappanangadi seeking a decree for partition and allotment of his share in the plaint B Schedule property, having an extent of 2.42 acres in R.S. 223/1 of Cherukad Village of Eranad Taluk. Respondents 1 and 2 filed O.S. 299 of 1984 seeking a decree for permanent prohibitory injunction in respect of the same property contending that the property belongs to them absolutely. Plaint B schedule property admittedly originally belonged to deceased Pathummakutty Umma having obtained it on lease. Appellant is the son of Pathummakutty Umma in her first husband. Respondents 1 to 3 are the children born to her in her second marriage. Appellant contended that on the death of Pathummakutty Umma, plaint B schedule property devolved on all the legal heirs and therefore he is entitled to 2/7 shares and 3rd respondent is entitled to 1/7 shares and respondents 1 and 2, 2/7 shares each. Respondents contended that plaint B schedule property is not available for partition as under Ext. A3 gift deed executed on 23-1-1963, Pathummakutty Umma had gifted the properties to respondents 1 and 2 and the gift deed was acted upon and accepted by them and being the donees, respondents 1 and 2 were in possession of the property

since then and under Ext. B1 registered partition deed dated 19-7-1965, the property was divided between respondents 1 and 2 and first respondent purchased jenmon right from the Land Tribunal in respect of the property obtained under Ext. A3 and B1 evidenced by Ext. B2 purchase certificate and second respondent purchased jenmon right from the Land Tribunal in respect of the property obtained by him under Ext. B1 evidenced by Ext. B 3 purchase certificate and they were separately paying tax for the respective portions of the property since then and therefore appellant is not entitled to claim any share. Appellant sought the decree for partition after getting Ext. A3 gift deed set aside on the ground that it is vitiated by undue influence and hence not binding on the appellant or plaint B schedule property.

2. Respondents 1 and 2 in their suit contended that they are in absolute possession and enjoyment of the plaint schedule property under Ext. A3 gift deed and under Ext. B1 partition deed and Ext. B2 and B3 purchase certificate and defendants are not entitled to trespass into the plaint schedule property and therefore they are to be restrained by a permanent prohibitory injunction. Defendants in their written statement contended that they are in joint possession of the property as the property originally belonged to the mother Pathummakutty Umma and on her death it devolved on appellant also and they are in joint possession of the property and therefore respondents 1 and 2 are not entitled to the decree sought for. Both suits were tried jointly. Appellant was examined as PW 1 and a witness was examined as PW2. First respondent was examined as DW1 and a witness was examined as DW2. Exts. A1 to A3 on the side of appellant and Ext. B1 to B29 on the side of respondents were marked.

3. Learned Munsiff on the evidence found that the original of Ext. A3 gift deed was not produced and Ext. A3 gift deed was executed by an illiterate old lady and respondents 1 and 2 did not establish that the gift deed was validly executed by deceased Pathummakutty Umma or that it was accepted and acted upon. It was held that on the death of Pathummakutty Umma the property devolved on all the children and Ext. A3 gift deed is not valid. A preliminary decree was passed directing division of the plaint B schedule property into seven shares and allotment of two such shares to appellant after setting aside Ext. A3 gift deed. O.S. 299 of 1984 was dismissed in view of the preliminary decree passed in OS. 4 of 1985.

4. Respondents 1 and 2 challenged the decree and judgment in A.S. 1 of 1989 and A.S. 11 of 1989. Learned Sub Judge, on reappreciation of evidence, set aside the findings of the learned Munsiff and held that Ext. A3 gift deed was executed by deceased Pathummakutty Umma and it is valid and binding on appellant and plaint B schedule property. It therefore held that appellant is not entitled to claim a share. After setting aside the preliminary decree granted in O.S. 4 of 1985, a decree for injunction was granted in O.S. 299 of 1984. R.S.A. 874 of 1994 is filed challenging the decree in O.S. 299 of 1984 as modified in A.S. 11 of 1989. R.S.A. 868 of 1994 was filed challenging the decree and

judgment in O.S. 4 of 1985 as modified in A.S. 1 of 1989.

5. Appeals were admitted formulating the following substantial questions of law.

1) When Ext. A3 gift deed was alleged to have been executed by an illicit, rustic, old and disabled Muslim Pardanashin lady, whether first appellate court was justified in accepting the same without the sufficient proof.

2) Whether first appellate court was correct in placing the burden of proof on the appellant to establish that Ext. A3 was vitiated.

Learned Counsel appearing for the appellant and respondents 1 and 2 were heard.

6. The argument of the learned Counsel appearing for appellant was that the original of Ext. A3 gift deed was not produced and no evidence was adduced to prove that Ext. A3 gift deed was executed voluntarily by Pathummakutty Umma or that she executed it after getting proper advise. It was argued that Pathummakutty Umma being an illiterate old unhealthy Muslim Pardanashin lady and evidence of DW1 shows that she had no particular affinity towards respondents 1 and 2 or ill will against appellant and in such circumstances first appellate court should not have upheld the validity of Ext. A1 gift deed. Relying on the decision of the Apex Court in Ram Sarup Gupta (Dead) by Lrs. Vs. Bishun Narain Inter College and Others, it was argued that the pleading has to be read as a whole and first appellate court was not correct in holding that there was no pleading on the vitiating circumstances and sufficient facts were pleaded in the plaint and on the facts and circumstances of the case, first appellate court should not have cast the burden on the appellant to prove that Ext. A3 gift was vitiated. Relying on the decision of the Apex Court in Krishna Mohan Kul @ Nani Charan Kul and Another Vs. Pratima Maity and Others, , Sethani v. Bhana AIR 1993 SC 956, and that of the High Courts in Ashok Kumar and Another Vs. Gaon Sabha, Ratauli and Others, , Bibi Jaibunnisa Vs. Abdul Ghafoor and Others, , Smt. Mallo Vs. Smt. Bakhtawari and Others, and J.C. Budharaja Vs. State of Orissa and Others, , it was argued that when Ext. A3 gift deed was executed by a Muslim Pardanashin lady, who was illiterate and aged the burden in on the donees who had sufficient influence on the donor, as she was admittedly residing with them, to prove that no undue influence was exerted and Ext. A3 is not vitiated and first appellate court should not have interfered with the findings rendered by the trial court. It was argued that on the death of Pathuminakutty Umma plaint schedule property devolved on all legal heirs and possession of respondents 1 and 2 could only be for all the coowners and Ext. A2 and A3 purchase certificate obtained by them shall enure to the benefit of appellant also and therefore appellant is entitled to the shares granted by the trial Court.

7. Learned Counsel appearing for respondents 1 and 2, argued that there is no pleading or evidence to prove that Pathummakutty Umma was a Pardanashin lady. It was also argued that there was no pleading that she was laid up and even according to appellant, plaint B schedule property was obtained on lease by

Pathummakutty Umma and was being managed by Pathummakutty Umma and even the buildings was constructed by Pathummakutty Umma and in such circumstances she cannot be a Pardanashin lady and first appellate court appreciated the evidence, in the proper perspective and found that Ext. A3 gift deed is valid and it cannot be interfered in exercise of the powers of this Court u/s 100 of Code of Civil Procedure. It was also argued that though appellant denied that he was one of the attesting witness to Ext. B1 partition deed, no value could be attached to the said deed as appellant had denied his signature in the Vakalat filed by him in O.S. 299 of 1984 and when the property divided under Ext. B1 is the plaint schedule property and it was divided on the strength of the right obtained by respondents 1 and 2 under Ext. A3 gift deed, appellant cannot be heard to contend that he was unaware of the gift deed till he received the summons in O.S. 299 of 1984 as canvassed by appellant and evidence establish that Ext. B1 gift deed was accepted and acted upon and for the respective portions respondents 1 and 2 purchased the jenmom right from the Land Tribunal evidenced by Ext. B2 and B3 and have been in possession of the property since then and in such circumstances appellant is not entitled to claim a share and first appellate court rightly granted a decree for injunction.

8. As declared in 89 Ind. Cas. 649 (Privy Council) in India Pardanashin ladies have been given a special protection in view of the social conditions of times. They are presumed to have imperfect knowledge of the world, as by the pardha system they are practically excluded from social intercourse and communion with the outside world. When a document executed by the Pardanashin lady is disputed, the burden of proof is on the person who seeks to sustain the document. Apex Court in *Kharbuis Kuer v. Janghahabur Rai* 1963 SC 1203 settled the question holding that as regards documents taken from Pardanashin women, court has to ascertain that the party executing them has been a free agent and duly informed of what she was executing. The reason for the rule is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply. The burden of proof shall always rest on the person who seeks to sustain a transaction entered into with a pardahnashin woman to establish that she executed it after clearly understanding the nature of the transaction. That rule is evolved for the protection of Pardahnashin ladies and cannot be confused with the doctrine such as fraud, duress or undue influence which would apply to all persons whether they are pardanashin women or not. The question is whether Pathummakutty Umma was a pardahnashin woman as canvassed by the learned Counsel for appellant.

9. As rightly argued by learned Counsel appearing for respondents 1 and 2, there is no pleading in the plaint that Pathun makutty Umma was a Pardanashin lady. There is also no pleading that she used to wear pardha and because of exclusion was incapable of knowing the effect of transaction like Ext. A3. Learned Counsel appearing for appellant argued that as Pathummakutty Umma is a Muslim lady, she is to be taken as a Pardanashin lady. Learned Counsel appearing for respondent relied on a Division Bench decision of this Court in *Popular Bank Ltd.*

v. Sainuba Beevi 1965 KLT 314 where an identical question was considered and submitted that there is no presumption that all muslim women are pardanashin ladies. In Sainu Beevi's case (supra) a Division Bench of this Court had considered the exact question. As in this case there was no pleading in that case that the lady was a Pardanashin, but evidence was let into the effect that she was wearing parda, in this case even PW1 did not depose that Pathummakutty Umma was a pardanashin lady or that she was wearing parda. Division Bench ruling shows that a learned Single Judge, on the facts of that case held that she is illiterate and a Muslim woman and even if strictly speaking she is not pardanashin, being a muslim woman, who are comparatively ignorant and backward, the presumption arising in respect of pardanashin woman is to be applied. The Division Bench did not agree with the view following the decision of the Apex Court in Kharbuis Kuer's case (supra) where reliance was placed on a privy, council decision in Farid-un-Nisa's case (supra). The Division Bench held:

There is no evidence in the case before us that the Muslim women of this State are purdah-nishins entitled to such protection, brought about by the social conditions under which they are excluded from social intercourse and communion with the outside world so as to make their knowledge of the world imperfect. In fact, Raman Nair. J has not found that the Muslim women of the State are purdah-nishins. There is no such plea either in the written statement; nor does the evidence of the 2nd defendant go to that extent.

10. In the light of the Division Bench decision, for the sole reason that Pathummakutty Umma was a Muslim woman, appellant is not entitled to contend that Pathummakutty Umma was a pardanashin lady and therefore the presumption available to a transaction by a Pardanashin lady is to be applied.

11. True, when a sale deed is executed by an old, illiterate woman, as held by Apex Court in Sethani's case the onus to prove that the sale deed executed by the old illiterate woman was not under undue influence is on the person who seeks to sustain the transaction especially when the woman is residing with him and is depending on him. It is also true that the presumption applicable in respect of a transaction entered into by a pardanashin woman is applicable when the disputed transaction is entered into by an illiterate, aged woman belonging to the backward strata.

12. The question is whether Pathummakutty Umma qualifies to claim the presumption. Though evidence of PW2 was relied on to argue that Pathummakutty Umma was laid up due to illness and was aged, apart from want of pleading Ext. A3 shows that she was aged only 56 years at that time. Though she died in 1984 at the age of ninety plus, the relevant period to be considered is the period of execution of Ext. A3. It cannot be said that she was an old woman at that time. There was also no evidence to prove that she was suffering from any illness at that time. On the other hand evidence establish that she was a capable lady as even appellant contended that she obtained the property on lease and was managing the property of her own. If so on the facts and

circumstances the presumption available to a Pardahnashin lady cannot be invoked on the transaction culminated in execution of Ext. A3 and the burden cannot be shifted on the defendants.

13. Evidence establish that deceased Pathummakutty Umma was residing with respondents 1 and 2 the donees under Ext. A3. But for that reason alone, it is not possible to hold that Ext. A3 gift deed is vitiated by undue influence as canvassed by appellant. On the facts and circumstances of the case, the burden cannot be shifted on respondents 1 and 2. The allegation was that the gift deed was obtained by undue influence and misrepresentation. In Sethani's case (supra), Apex Court was considering the failure of the vendee to adduce evidence on the absence of undue influence as the sale deed was executed by a woman who was old, illiterate, and blind. It was held that the parties were so situated that respondents in that case were in a position to dominate the will of the executant and were in a position to obtain unfair advantage over her in such circumstances it was held that burden is on the vendees to prove that the document was not vitiated. But on the facts of this case, the principle cannot be applied. Though learned Counsel appearing for appellant argued that respondents 1 and 2 did not adduce any evidence to prove that the gift deed was executed voluntarily and without any undue influence and out of the free will and pleasure of the donor, it is to be borne in mind that the gift deed was never challenged by the donor. Ext. A3 gift deed was executed in 1963. The donor admittedly died after 1984. Two years after the execution of Ext. A3 gift deed, donees thereunder divided the properties under Ext. B1 registered partition deed. Thereafter they separately purchased jenmom right of the respective portions of the properties obtained by them under Ext. B1 in 1977 and 1978 evidenced by Ext. B2 and B3 purchase certificates. Ext. B1 partition deed was executed on 19-6-1965. The donor did not take any steps to challenge Ext. A3 gift deed till her death.

14. First appellate court appreciated the entire evidence and entered a factual finding that the case of appellant that it is vitiated by undue influence was not substantiated. Learned Counsel for residents 1 and 2 pointed out that appellant was one of the attesting witness to Ext. B1 registered partition deed, where under properties obtained under Ext. A3 gift deed were divided between respondents 1 and 2, the donees. As PW1 appellant denied the factum of attestation of Ext. B1. But it is not possible to believe that denial. True, in the written statement it was not specifically pleaded that appellant was one of the attesting witness to Ext. B1. But the omission to plead that fact by itself is not a circumstance either to believe the case of appellant that he was not the attesting witness or to disbelieve the case of DW1 that appellant was the attesting witness. When his signature in Ext. B1 was put to the appellant as PW1, he denied the signature. At the same time, he denied his admitted signature in the vakalath filed in O.S. 299 of 1984. It is seen that O.S. 4 of 1985 was filed subsequently, on the allegation that appellant came to know about the existence of Ext. A3 gift deed only on receiving the summons in O.S. 299 of 1984. When

appellant had affixed his signature in the written statement filed in O.S. 299 of 1984, he has only affixed his thumb impression in the plaint and the vakalath in O.S. 4 of 1985. Evidently appellant was aware of the factum of attestation in Ext. B1 as otherwise he would have affixed his signature as done in the written statement in O.S. 299 of 1984. Moreover, appellant has no case that the attesting witness Mohamed seen in Ext. B1 is some other Mohamed and not himself. Under these circumstances it can only be taken that appellant is one of the attesting witness to Ext. B1. If that be so, appellant has to be imputed with the necessary knowledge of execution of Ext. A3 gift deed, as he is the attesting witness to Ext. B1 partition deed whereunder the property which belonged to his mother, and for which appellant is claiming a share, was divided on the basis of the right derived under Ext. A3. Pathummakutty Umma would have challenged Ext. A3, if it was not voluntarily executed and was vitiated by undue influence as contended by appellant. It is clear that first appellate court rendered the finding that Ext. A3 gift deed is valid and was not vitiated as contended by appellant, on the evidence on record. When under Ext. A3 gift deed, Pathummakutty Umma had transferred the property in favour of respondents 1 and 2, on the death of Pathummakutty Umma appellant is not entitled to claim a share in that property. Therefore appellant is not entitled to a share in the property as claimed in O.S. 4 of 1985. Consequently respondents 1 and 2 are entitled to the decree for injunction granted in O.S. 299 of 1984.

There is no merit in the appeals. Both appeals are dismissed. No cost.