

(1989) 06 KL CK 0011
In the High Court Of Kerala
Case No : S.A. No. 1070 of 1983

Kumaran Nair

APPELLANT

Vs

Mohammed Haneefa and Another

RESPONDENT

Date of Decision : 19-06-1989

Acts Referred:

Kerala Land Reforms Act, 1963 — Section 106
Succession Act, 1925 — Section 138, 95
Transfer of Property Act, 1882 — Section 10

Citation : (1989) 2 KLJ 61

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : S. Subramani, for the Appellant; P.G. Parameswara Panicker and P. Parameswara Kaimal, for the Respondent

Final Decision : Dismissed

Judgement

S. Padmanabhan, J.—Ext. A1 will executed by Krishna Pillar bequeathing his properties individually to his eleven children on 16-1-1966 took effect after his death. Though the different items were given to the legatees absolutely with full right of alienation, there is a provision at the fag end that the legatees could sell the properties only to one or more among the other legatees and not to strangers and any document executed in violation could be got set aside by others. Plaintiff schedule 51/2 cents and the shop building in it was allotted to the first defendant. Plaintiff is another son of Krishna Pillai. Properties were bequeathed to him also. First defendant is a low paid employee in the Government Press. His residential building in another property got destroyed in flood. He was in urgent need of raising funds to reconstruct it. Only solution was to sell the suit property. He approached all the other ten legatees including the plaintiff requesting them to purchase the property, They refused saying they have no funds. Registered notices were issued to all evidenced by Ext. B1 series. Plaintiff alone did not get the notice, reason being his name was written by mistake as Sukumaran Nair instead of Kumaran Nair. Another brother by name

Sukumaran Nair got two notices. Since nobody came forward to purchase, first defendant sold the property to the second defendant on 3-10-1979 for Rs. 10,000/-. Second defendant was already in occupation of the building. That may be one of the reasons why others did not purchase. None else except the plaintiff has now any complaint. Non-receipt of notice is the sole ground which actuated the suit. The suit is said to be at the instigation of the other legatees and one of their tenants who supplied funds.

2. Prayer in the suit is to get a sale deed executed for Rs. 10,000/- in exercise of the right conferred under Ext. A1 which is claimed to be a right of pre-emption. Defendants contended that there is no right of preemption in Ext. A1 and what is involved is only an absolute restraint on alienation which is void being repugnant to the absolute estate created under the will. Second defendant also claimed to be a bona fide purchaser for value without notice of the provision. That contention was found against by the trial court. His claim under S. 106 of the Land Reforms Act was also rightly negated. Trial court decreed the suit on the finding that What is involved is a pre-emption clause. But the appellate court disagreed and said that it is not a pre-emption clause but a restraint on alienation which is void. Appeal was allowed -and the suit dismissed. Hence, the plaintiff came up in appeal. But the appellate-court also agreed with the trial court on the findings that plaintiff had no notice, that the second defendant is not a bona fide purchaser and that he is not entitled to the benefits of S. 106 of the Land Reforms Act.

3. Right of pre-emption is not a right to the thing sold. It is only a preferential right in the event of sale to purchase the property upon agreed terms. It is a right to the offer of a thing about to be sold. It is purely a personal right which cannot be transferred to a stranger because the object itself is to avoid inconvenience by introducing strangers. It is a primary or inherent right. The pre-emptor has also a secondary or a remedial right to follow the thing sold. Ext. A1 does not say that any one among the legatees is having the right or duty to purchase the property if offered. It only says that sale could only be to the legatees and not to strangers. Right to get a sale deed, executed in violation of the provisions, set aside is given to each among the other legatees without a corresponding liability or right to, purchase the property. That means they can simply get the sale deed set aside without offering to purchase the property. Going by the provision any sale to a stranger is forbidden even if none of the legatees is interested in purchasing. It is doubtful whether it could be interpreted as a right to pre-emption. It is more a restraint on alienation and does not provide any term or condition for purchase. Right of pre-emption could rest only in contract, custom or statute. Ganshamdoss Narayandoss and Others Vs. Saraswathi Bai and Others, relied on by the appellant is not applicable because in holding that a particular provision in a will is a pre-emption clause the courts was only considering whether an absolute estate or a, limited estate alone was created

4. I agree with the appellate judge that what is involved is only a restraint on alienation and not a pre-emption clause. An absolute estate was created and the impugned clause comes only thereafter. It could be said that S. 10 of the Transfer of Property Act is not applicable, Ext. A1 being only a testamentary disposition and not a transfer inter vivos. There is no provision in the Indian Succession Act corresponding to S. 19 of the Transfer of Property Act. Therefore resort must be had to Sections 95 and 138 of the Indian Succession Act. Section 95 provides that the legatee is entitled to the full interest of the testator unless it appears that only a restricted interest was intended for him. According to S. 138 when a fund is absolutely bequeathed with a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction. "Fund" could take in immovable property as well. It cannot be said as provided in S. 95 that a restricted interest alone was provided. Absolute right was created. Any provision repugnant to the absolute estate could be ignored as provided in S. 138.

5. Then the question is whether the clause involves only a partial restraint on alienation or an absolute restraint. AIR 1932 158 (Privy Council) relied on by the appellant was rejected by the appellate judge on the ground that it involved a pre-emption clause agreed as a result of contact between parties. But that decision further held that after the passing of the Transfer of Property Act a partial restriction on the power of alienation would not, in the case of a transfer inter vivos, be regarded as repugnant, and that the expression "equity and good conscience" as generally interpreted in English law, if found applicable to Indian Society and circumstances, a partial restriction would not be regarded as repugnant even in the case of a testamentary gift. Almost all the standard commentaries on S. 138 of the Indian Succession Act also recognise the validity of a partial restraint in a testamentary disposition depending upon the facts of cases and the intention and wishes of the testator. It is not necessary here to expatiate on those aspects or the principles to be applied in interpreting the provisions of a will. We could proceed on the assumption that if the impugned clause operates only as a partial restraint in the interests of the members of the family in the sense that alienation to strangers alone is prohibited and that too only if the legatees are prepared to purchase the property, it need not be taken as repugnant to the absolute interest created and as such void.

6. As held in *Taylor v. Adlrod* (1954 Chancery Division 29) the test is whether power of absolute alienation which is the incident of ownership of property is taken away or only reasonably restricted. The condition must be impossible and repugnant and acting as a practical restraint in the exercise of the right of ownership. As held in AIR 1929 283 (Privy Council) the question for determination is whether the subsequent restrictive clauses are sufficient to displace the effect of dispositive words or whether such subsequent clauses are merely repugnant to the absolute estate. The clauses which were to come into operation after the legatees inherited the legacy must be regarded as an attempt to impose repugnant conditions upon the estate so created and are void. One test is to

ascertain the intention of the testator, whether it is to maintain the absolute estate created with restriction in derogation of the incidents of such absolute estate or whether the intention is to extinguish the absolute estate in the happening of a contingency. The first is a repugnant clause whereas the second is only a defeasance clause.

7. None of those aspects arise in this case. The Trichinopoly Varthaga Sangam, Limited Vs. T.N. Shanmughasundaram, stems to have given sufficient clue to answer the effect of the clause involved in this case. In that case the prohibition against alienation to strangers, as in this case, was intended to continue in perpetuity. The right to sell within the family is given though the right to sell to strangers is prohibited. No obligation is placed on the members of the family to purchase and no price is fixed. NO guidelines are also given. It is not provided that even when the family members refuse to purchase, alienation to strangers could be bad. Without an obligation to purchase even after a sale to a stranger the other members are given the right to get the sale deed set aside so that the property may revert back to the legatee himself. If the provision is construed as it is it will operate as a permanent bar on the right of alienation if no number of family is willing to purchase. The court has to examine the effect of the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be the possibility of an alienation taking place according to the sweet will and pleasure of the members of the family with their bargaining capacity would not necessarily take the case out of the repugnancy. It is undisputed that all other members were not prepared to purchase even though approached. It is true that both the courts held that the appellant was not given notice. But the appellant's admission as Pw. 1 shows that he is being financed and assisted in this litigation by all other legatees. As DW. 1 the first defendant said that before notice he approached all the legatees including the appellant to purchase the property. This is therefore a joint fight against the stranger purchases. The other legatees who were approached by the first defendant must necessarily have informed the appellant also. Till the sale deed in favour of the second defendant he did not want to purchase the property either because he had no funds or because he found it difficult to get possession since the second defendant is in occupation of the building as tenant. Now he feels that the line is clear because by the sale second defendant became the owner. This is clear from the prayer in the plaint by which he not only wants a sale deed but physical possession also.

The second appeal is therefore dismissed, however without costs.