

(1965) 12 KL CK 0022
In the High Court Of Kerala
Case No : Second Appeal No. 1200/61

Kuttialikutty Marakkar Haji	Vs	APPELLANT
Thazhathil Kandankutty and Others		RESPONDENT

Date of Decision : 16-12-1965

Acts Referred:

Citation : AIR 1967 Ker 78

Hon'ble Judges : M. Madhavan Nair, J

Bench : Single Bench

Advocate : B.Moosakutty, for the Appellant; K. Raghavan Nair, for the Respondent

Final Decision : Dismissed

Judgement

M. Madhavan Nair, J.—The plaintiff has executed a Panayam deed Ext. B-1 and the 1st defendant, in return, a Panayakaichit Ext. A-1 on April 18, 1953. The advance under the transaction is Rs. 100 and the rental payable to the plaintiff Rs. 11 per annum. The 1st defendant contended that, though two items of properties were mentioned in the deeds, they really concerned the 1st item alone, that the 2nd item had not been given possession to him and that till he received the suit notice he was even unaware of the mention of the 2nd item in the deeds. The Munsif found that item No. 2 did not belong to the plaintiff and that the rental stipulated in the deeds was for the 1st item only; and that has been upheld by the Subordinate Judge. The Courts below have accordingly decreed the arrears of rent claimed. In this second appeal the plaintiff challenges the negation of his title to plaintiff item No. 2.

2. It is conceded that suit item No. 2 belonged originally to the 2nd defendant. On September 26, 1945, he had executed a deed of gift, Ext. B-6, in favour of the 8th defendant, his daughter, who was then 2 months" old, expressly stating therein that thereafter he would be holding the property as her guardian. It appears that subsequently the donor had changed his mind, and executed Ext. A-5 on November 6. 1950, assigning the property to the plaintiff and delivering

his document of title along with it. Defendants 3 and 8--Mother and daughter--contend that the assignment to plaintiff is incompetent and void. The Courts below have found Ext. B-6 valid and Ext. A-5 incompetent. The correctness of those findings is canvassed in this second appeal by the plaintiff.

3. Counsel for appellant contended that the parties are Shafeis under whose personal law a gift by an ascendant to a descendant is revocable at will and that u/s 42 of the Transfer of Property Act a subsequent alienation by the father-donor operates as revocation of the earlier gift. Counsel for respondents points out that there is neither pleading nor proof in the case that the parties are Shafeis.

4. The Madras District Gazetteers (Malabar) Vol. I page 188 contains the observation :

"The Mappillas belong to the Shafi school of the Sunni Sect of MuhammadansIn South Malabar they are divided into two divisions, preferring allegiance to the Valiya Jaratingal Tangal of Ponnani and the Kundotti Tangal respectively"

In Kotambiyakath Pathu Kutti Umma and Others Vs. Nedungadi Bank Ltd. and Others, at p. 734 it is observed:

"*.... such wakfs are common in modern Egypt. This is perhaps because it is Egypt which is the stronghold of the doctrines associated with the name of Shafei which also find acceptance among the Mappillas of South Malabar generally. It will thus be seen, apart from the fact that the executant of the wakf in the present case is governed by the Shafei School of law and therefore the doctrine of Shafei must apply without question to the present case, that even according to the Hanafi School no delivery of possession is required to validate a wakf which is otherwise valid." Mulla, in his Principles of Mahomedan Law, observes:

"The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis Considerable groups of Mahomedans in the south of India, such as Kerala and Malabar, are Shafeis (Paragraph 28)". It is clear from the above weighty observations that the generality of Mappilas in South Malabar are Shafeis; but, it cannot be said that every Mappilla in South Malabar is a Shafei. In Valia Peedikakkandi Kutheessa Umma and Others Vs. Pathakkalan Naravanath Kumhamu and Others, --a case from the North Malabar-- the parties are seen treated as Hanafis. In these days when migration from a district to another in a State is so easy and common, it cannot be assumed conclusively that all Muslims in South Malabar are of a particular sect. The presumption can only be that an Indian Muslim is a Sunni of the Hanafi sect, Vide: Mulla's Mahomedan Law, Paragraph 28. Whenever a deviation from the Hanafi law, which is accepted to be the law most in vogue among the Indian Muslims, is sought to be relied on in a case, it has to be pleaded and proved as a fact.

5. It is unnecessary in this case to decide if the parties concerned are Shafeis or Hanafis; for, even if they are Shafeis, the gift under Ext. B-6 has, in the circumstances of this case, to be held operative. The law of gifts according to the Shafei doctrine has been detailed in Chapter VI of Mahomedan Law by Syed Ameer AH thus:

"A father has the right of revoking a gift made by him to his children, provided the donee has not Irrecoverably disposed of the object received. So also other ascendants with respect to gifts made to grandchildren and their descendants A revocation may be made in the following terms: "I revoke my gift," or "I reclaim the object," or "I wish the object to become my property again," or "I wish to break my gift," but it cannot be made impliedly by a subsequent disposition of the thing given, such as by sale, wakf, gift to another person or enfranchisement."

No express revocation of the gift under Ext. B-6 is in proof in this case; nor does a revocation as such recorded in Ext. A-5.

6. Counsel read Section 42, the Transfer of Property Act, thus :

"Where a person transfers any immovable property, reserving power to revoke the transfer, and subsequently transfers the property for consideration to another transferee, such transfer operates in favour of such transferee (subject to any condition attached to the exercise of the power) as a revocation of the former transfer to the extent of the power."

I should think that this Section renders no help to the appellant. Under it the revocation implied by a transfer is subject to any condition attached to the exercise of the power of revocation; and it is a rule of Shafei law (see supra) that the revocation of a gift to a child by the father must be express and cannot be by implication of a subsequent dealing of the property by the donor. Further, Section 2 of the Transfer of Property Act says "nothing in the second Chapter of this Act (which includes Section 42) shall be deemed to affect any rule of Muhammadan law". It must then follow that the gift under Ext. B-6 has not been affected by the subsequent assignment of the property by the 2nd defendant to the plaintiff. The courts below were right in holding that the suit item No. 2 belongs to the 8th defendant and not to the plaintiff.

7. The second appeal fails and is dismissed with costs.