(2010) 12 KL CK 0196

In the High Court Of Kerala

Case No : S.A. No. 492 of 2001

Manirajan Pillai and Others APPELLANT

Vs

K.K. Karunakaran Nair and Others RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Citation : AIR 2011 Ker 55 : (2011) 1 KLJ 344

Hon'ble Judges : S.S. Satheesachandran, J

Bench : Single Bench

Advocate : R. Rajasekharan Pillai, for the Appellant; K. Radhakrishnan (P), N. Ramdas and O.V. Maniprasad, for the Respondent

Final Decision : Dismissed

Judgement

S.S. Satheesachandran, J.—The Defendants in O.S. No. 223 of 1993 on the file of the Munsiff Court, Thiruvalla are the Appellants. Pending the appeal, the Respondent/Plaintiff had passed away and his legal heirs have been brought in as additional 2nd and 3rd Respondents.

2. The above suit was one for declaration of title, possession and injunction. Initially, the suit was filed as one for injunction alone, but, later, amended seeking the declaratory relief as well. There are two items of properties in the suit, both of which are claimed by the Plaintiff under Ext.Al gift deed executed by his maternal aunt Kunjulakshmi Amma. The Defendants/Appellants are the children of the other two sisters and brother of the aforesaid Kunjulakshmi Amma. Alleging interference, and threat of trespass, from the Defendants over his possession and enjoyment of the properties, the Plaintiff laid the suit for injunction, and, later, amended the plaint for declaration also, as his title was challenged by the Defendants impeaching Ext.Al gift. The Defendants filed a joint written statement, in which they contended that Ext.Al gift has not come into effect and it was the product of fraud and misrepresentation. The original gift deed always remained under the custody of the executant Kunjulakshmi Amma, who, later, realising the fraud and misrepresentation made, cancelled the gift.

She also executed another gift deed in favour of her sisters and brother, reserving her life interest over the property. After the death of Kunjulakshmi Amma, the donees under the subsequent document are in possession and enjoyment of the properties, was the case of the Defendants, resisting the claim canvassed by the Plaintiff for declaration and injunction set up in the suit.

3. On the materials placed, which consisted of PWs.1 to 3 and Exts.A1 to A5 series for the Plaintiff and DWs.1 to 3 and Exts.B 1 to B4 for the Defendants, the claim of the Plaintiff canvassed under Ext.AI gift deed was upheld by the trial court holding that such gift had come into effect on its execution by Kunjulakshmi Amma and acceptance by the donee, Plaintiff. The challenges raised impeaching its validity and also the rival claim of title and possession by the Defendants by way of subsequent gift deed from Kunjulakshmi Amma, revoking the previous deed were turned down. Suit was decreed declaring the title and possession of the Plaintiff over the suit property, granting him perpetual prohibitory injunction as well restraining the Defendants from trespassing and interfering with his possession and enjoyment. Challenge against the decision of the trial court by the Appellants was turned down by the lower appellate court, dismissing their appeal. Concurrent decision so rendered by the two courts below that the Plaintiff has obtained title and possession over the suit property under Ext.AI gift deed and also the decree of injunction passed against the Defendants, is assailed by them in this Second appeal.

4. Notice on admission given, the Respondent/Plaintiff entered appearance; and, later, on his demise, his legal representatives brought in as additional Respondents appeared.

5. I heard the counsel on both sides. The main thrust of challenge pressed into service by the learned Counsel for the Appellants to assail the concurrent decision rendered by the two courts below is that the contention of the Defendants that Ext.AI gift is vitiated by various reasons, has not been analysed and appreciated by the courts below according to the legal principles applicable to the case. In the given facts of the case, where the executant Kunjulakshmi Amma was shown to be pretty aged, 84 years old, and she, admittedly, after being hit by a scooter, was undergoing continuous treatment with intermittent hospitalisation, fraud and undue influence imputed in the execution of Ext.AI gift deed, at the instance of the Plaintiff, should have been analysed by the courts taking a different approach shifting the burden on the donee/the Plaintiff to establish that the document was not the product of undue influence or fraud as imputed, is the submission of the counsel. Reliance is placed on M. Kunka Kurup and Anr. v. Lakshmikutty Amma and Ors. 1984 KLJ 786 to contend that this was a case where a fresh appraisal and consideration by the court below following the different approach canvassed is necessary to render justice, and the finding entered that Ext.AI is not vitiated by undue influence or fraud as held by the courts below cannot be sustained. It is further argued by the counsel that the materials tendered in the case, and more particularly, Ext.AI gift deed itself, on

the face of it, disclose that there was a fraud on registration in execution of that document as it had been registered in a sub-registry not having jurisdiction over the suit property. That material circumstance itself is sufficient to render the document as void, but the courts below have brushed aside that legal infirmity cutting at the root of Ext.A1 deed, according to the counsel. Per contra, the learned Counsel appearing for the Respondents submitted that there is no merit in the challenges raised to impeach the concurrent decision rendered by the courts below that Ext.Al gift has come into effect and the Plaintiff has obtained title and possession over the property. Adverting to Ext.B2 cancellation deed executed by the donor, Kunjulakshmi Amma, it is submitted by the counsel, that even she had no case that any fraud or misrepresentation or undue influence was practised on her in the execution of Ext.Al gift deed in favour of the Plaintiff. Revocation of Ext.Al gift deed by the executant after that gift came into effect, according to the counsel, has been rightly and correctly found to be of no consequence by the courts below as the donor was incompetent to revoke the gift previously made where such right has not been reserved. Reliance is placed on M.K. Gopalakrishnan v. Rajamma 2006 (4) KLT 377 by the counsel to contend that after the acceptance of Ext.Al gift deed by the Plaintiff revocation of such gift, if at all permissible, was only by way of instituting a suit before the civil court. Challenge set up by the Defendants that in the execution of Ext.Al gift deed there is fraud on registration as the registration was done in a different Sub registry, which is imputed as not having jurisdiction over the suit properties, is also having no merit for the reason that no such case had been pleaded or proved in the case. Further more, it is submitted that Ext.B3 gift was registered at the same Sub registry where Ext.Al was registered, and that circumstance is sufficient to indicate that there was fraud on registration in execution of Ext.Al deed, is devoid of any merit. Reliance is also placed on Geetha Viswanathan and Ors. v. Sasidharan 2010 4 KHC 553 to contend that the question whether parties intended to commit a fraud on the law of registration is a question of fact, and it has to be pleaded and proved, and no such plea had been raised in the written statement filed by the Defendants in the present case, and so much so, that plea now canvassed to impeach the concurrent decision of the courts below is meritless as not entertainable.

6. Perusing the records of the case with reference to the submissions made by the counsel on both sides, I find there is no merit in the submissions made by the learned Counsel for the Appellant that the courts below had erred in adjudicating the question whether Ext.Al gift is vitiated by undue influence, fraud, misrepresentation etc. It is only in a case where the facts presented by the materials patently indicate that the transaction covered by the document impeached, is unconscionable or shown to be ''non-est factum'' the alternate method of approach indicated in M. Kunka Kurup''s case (cited supra) by the learned Counsel for the Appellants can be resorted to. Where the transaction appear on the face of it or the evidence adduced reveal that it is unconscionable, and also the person in whose favour the instrument had been created was in a

position to dominate the will of the executant, the alternate method of approaching the question whether the deed is vitiated by fraud or misrepresentation or undue influence shifting the burden on the person who is shown to be in a position to dominate the will of the executant emerge for consideration. Merely because the executant is shown to be pretty old and was undergoing intermittent hospitalisation during the period of the execution of the document challenged, consequent to injury suffered in a motor accident, and she was still with the Plaintiff, on such circumstances alone, it is not possible to hold that when a challenge is raised impeaching the instrument as vitiated by fraud, misrepresentation and undue influence, the burden shifts upon the donee/the Plaintiff to prove that it is free from such vitiating factors. The trial court has taken note that the evidence of the Plaintiff, as PW1, that the executant Kunjulakshmi Amma was a law graduate remained uncontroverted. His case that the executant Kunjulakshmi Amma was capable of taking care of herself at the time when she executed Ext.AI gift deed, it is seen, was corroborated a large extent by PW2, a doctor who attended on her. Then also, it is noticed that two years later when Kunjulakshmi Amma executed Ext.B2 cancellation deed revoking Ext.AI gift deed, she had no case that the previous gift in favour of the Plaintiff was the product of fraud, misrepresentation or undue influence. On the other hand, the statement in Ext.B2 would show that the cancellation was made asserting that Ext.AI gift has not come into effect since the conditions imposed thereunder and also the objects for which she executed that instrument had not been fulfilled. When the executant Kunjulakshmi Amma had no case even when she executed Ext.B2 cancellation deed for the purpose of revoking Ext.AI gift deed that there was any, fraud, misrepresentation or undue influence over her in executing Ext.AI gift in favour of the Plaintiff, it goes without saying that it is not open to the Defendants to set up such a challenge to impeach Ext.AI gift deed. The decision rendered in M. Kunka Kurup''s case (cited supra) has no application to the facts of the case. Nothing more need be stated over the validity of the Ext.B2 cancellation deed revoking Ext.AI gift deed and execution of Ext.B3 gift deed in favour of the Defendants by Kunjulakshmi Amma, than what is discussed by the courts below and the finding entered on that question concurrently. The evidence let in the case clearly demonstrate Ext.A1 gift deed has come into effect and the Plaintiff, after effecting mutation of the property in his name, is in possession and enjoyment of the same. He could produce only a certified copy of the gift Ext.AI and the original of that gift was produced by the Defendants does not in any way indicate that there was no acceptance of the gift. The contents of Ext. A1 gift deed would also indicate that after such gift coming into effect, the donor Kunjulakshmi Amma had no right to revoke that instrument. Ext.B2 cancellation deed and the subsequent gift deed executed by her in favour of others, including the Defendants have no validity when, there was divesting of her title under Ext.A1 gift deed in favour of the Plaintiff. So far as the challenge raised that there was a fraud on registration in the execution of Ext. A1 gift deed as it had been registered at a different Sub registry not having jurisdiction over the properties covered by the instrument, it is seen that no such plea had been raised in the joint written statement filed by the Defendants. The revocation deed Ext.B2 and subsequent gift deed Ext.B3, both of them are seen registered in the same Sub registry office where Ext.Al was registered, as rightly contended by the learned Counsel for the Respondent, is more than sufficient to discard the challenge raised over the fraud on registration which was not even pleaded in the statement filed by the Defendants.

The appeal does not involve any question of law leave alone any substantial question of law, and as such, it is not entertainable. Appeal is dismissed directing both sides to suffer their respective costs.

