
(2011) 09 KL CK 0048

In the High Court Of Kerala

Case No : Regular Second Appeal No. 1371 of 2004

Narayani and another

APPELLANT

Vs

Sreedharan

RESPONDENT

Date of Decision : 07-09-2011

Acts Referred:

Transfer of Property Act, 1882 — Section 19, 21

Citation : (2011) 4 ILR (Ker) 400

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : K.G. Balasubramanian, for the Appellant; G. Sreekumar (Chelur) and Sri K. Ravi (Pariyarath), for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice M. Sasidharan Nambiar

1. Defendants in O.S.333/1996 on the file of Principal Munsiff Court, Irinjalakuda are the appellants. Plaintiff is the respondent. Suit was filed for

partition of the plaint schedule properties and allotment of one half share due to the respondent. Plaint schedule properties are 14 cents in survey

No. 119/1 and 26 cents in survey No. 119/2 of Annallur Village of Mukundapuram Taluk. Respondent would contend that the plaint schedule

property originally belonged to first appellant and her husband Govindan, parents of the respondent and second appellant. Though under Ext.B-1

settlement deed, the properties were agreed to be enjoyed jointly by the first appellant and Govindan, Govindan assigned his one half right over the

plaint schedule properties to the respondent under Ext.A-1 sale deed dated 25-2-1995 and hence respondent has one half right in the plaint

schedule properties. Respondent sought separation of his one half share

contending that he is not willing to continue joint possession. First appellant resisted the suit contending that the plaint schedule properties were purchased by the first appellant and her husband under registered sale deed 495/1120 ME and have been in possession and enjoyment of the same and while so, in 1986 she along with her husband executed Ext.B-1 settlement deed which provides that properties shall be in their joint possession and Govindan during his lifetime has no right of alienation and on the death of anyone of them, the other would get absolute right over the property. It was contended that Govindan is therefore not competent to assign his right and therefore, respondent is not entitled to claim any right under Ext.A-1 sale deed. It was contended that in 1996, first appellant assigned the plaint schedule properties in favour of the second appellant and he has been in possession of the property and the respondent is not entitled to claim any share. Second appellant filed a separate written statement reiterating the same contentions.

2. Learned Munsiff on the evidence of P.W. 1, Exts. A-1 to A-5 and B-1 and B-2 found that Govindan and first appellant jointly executed Ext B-

1 and it provides that on the death of the other, the property would devolve on the surviving executant absolutely and without the consent of the

first appellant, Govindan was not entitled to transfer his right and therefore, based on Ext.A-1 executed by Govindan, respondent is not entitled to

claim any share. Suit was dismissed. Respondent challenged the decree before District Court, Thrissur in A.S. 345/2003. Learned Additional

District Judge on re-appreciation of the evidence found that though Ext.A-1 provides that plaint A schedule property shown therein shall be in their

joint possession during their life time, on the death of anyone of them, the surviving executant shall enjoy it absolutely with power of alienation. It

was also found that Govindan has the right to alienate his right in the property, as it is not prohibited under Ext.B-1, and Govindan validly alienated

his rights under Ext.A-1 and hence respondent is entitled to one half share. Finding that the plaint schedule properties are available for partition,

appeal was allowed and a preliminary decree was passed directing division of the plaint schedule properties into two equal shares and allotment of

one share, with future share of profits, to the respondent providing that second appellant is liable to pay the share of profits. The said decree is

challenged in this appeal.

3. Appeal was admitted formulating the following substantial question of law:

(1) Whether, on the facts and circumstances of the case, the learned District Judge was correct in holding that the condition in Ext.B-1 conferring a

joint estate on the executors created a transferable right in Govindan?

(2) Whether, on the facts and in the circumstances of the case, is not the condition in Ext.B-1 a valid restriction depriving an absolute right in either

of the executors?

(3) Does not the said condition create an absolute estate in favour of the survivor, the right of transfer by other one during the lifetime of the other

being nil? Is not the interest created by the deed of a limited nature on either during the lifetime of both?

4. First appellant died subsequent to the filing of the appeal. On the statement submitted by the second appellant, it is recorded that legal heirs of

the first appellant need not be impleaded, in view of Ext.B-2 executed by the first appellant in favour of the second appellant.

5. Learned counsel appearing for the appellants submitted that courts below did not properly appreciate Ext.B-1. It was argued that though the

nomenclature of Ext.B-1 is that it is a settlement deed, in effect it could only be a Will. Learned counsel submitted that Ext.B-1 is in fact a joint

mutual Will, as it provides that though the properties were obtained by different documents by the two executants, the husband and wife, they were

treated as joint properties and Ext.B-1 provides that the properties are to be enjoyed together during their lifetime and on the death of anyone of

the executants, the surviving executant will get absolute right, including the right of alienation and it further provides that if the properties are

available on the death of the surviving executant, it should go to all their children who are the legatees under the Will and hence it is a joint mutual

Will. Learned counsel would argue that once Ext.B-1 is proved to be a joint mutual Will executed by the husband and wife, without consent of first

appellant, her husband, Govindan, could not have alienated his rights and therefore, Ext. A-1 is invalid and under Ext. A-1, respondent is not

entitled to claim any share. Learned counsel relied on the decisions of the Honourable Supreme Court in Kochu Govindan Kaimal and Others Vs.

Thayankoot Thekkot Lakshmi Amma and Others, , Dilharshankar C. Bhachech Vs.

Controller of Estate Duty, Ahmedabad, and Kokilambal and

Others Vs. N. Raman, . Relying on the decision in Kokilambal's case (supra) it is argued that Ext.B-1 creates a vested interest on the first

appellant on execution of Ext.B-1 which treats the rights available to Govindan as joint right, along with the rights of the first appellant and the

recitals in Ext.A-1, executed by Govindan, and Ext.B-2, executed by the first appellant, further establishes that Ext.B-1 creates a joint vested right

on the husband and wife and if that be so, Ext.B-1 can only be a joint mutual Will. Learned counsel also argued that even though Ext.B-1 does not

specifically provide that there is no right of revocation, provisions made in Ext.B-1, by implication, makes it clear that the joint properties on the

death of one of the executant shall go to the other executant, who has absolute right to transfer the properties and therefore, courts below should

have found that Govindan had no right to transfer his rights in favour of respondent under Ext.A-land as Ext.B-1 is a joint mutual Will, on the death

of Govindan, first appellant became the absolute owner of the properties and therefore, under Ext. B-2 she is entitled to transfer the properties and

hence it should have been found that the plaint schedule properties are not available for partition.

6. Learned counsel appearing for the respondent argued that Ext. B-1 even if construed as a Will, cannot be a joint mutual Will and at best, it

could only be a joint Will executed by the husband and wife, where under they made provisions with regard to their rights in their properties.

Learned counsel argued that Ext. B-1 does not show that either of the executants divested his/her exclusive right in the plaint schedule properties

and agreed to vest that right on the other executant and it only provides that during their lifetime the properties are to be in their joint possession

and therefore, it is not a reciprocal Will and hence, it cannot be a joint mutual Will. Learned counsel also argued that Ext. B-1 specifically provides

that only if the properties are available on the death of any of the executants, the other would get the property and therefore, it is not only a case of

absence of a provision providing non revocation, and instead it provides for alienation by anyone of the executants. It was pointed out that Ext. B-

1 does not provide that alienation could only be by the executants jointly. It is therefore argued that when Govindan had the right of alienation of

the property and under Ext A-1, he alienated his rights in favour of the respondent, respondent is entitled to one half right of Govindan and

therefore, the preliminary decree granted is perfectly legal and correct.

7. First question to be decided is whether Ext. B-1 is a settlement deed or a Will. This aspect was not considered by the courts below evidently

for the reason that no such contention was raised before the courts below. Whatever it be, in the light of the submissions made, it is necessary to

settle that question. If by execution of Ext. B-1, right is transferred in praesenti, it can only be treated as a settlement deed. On the other hand, if no

right is transferred in praesenti and by execution of Ext. B-1, provision is made only for transfer of the right, after the death of either or both of the

executants, it could only be treated as a Will.

8. The principles to construe whether the document is a Will or a settlement is settled by, the Honourable Supreme Court in Namburi Basava

Subrahmanyam Vs. Alapati Hymavathi and others, as follows:

The nomenclature of the document is not conclusive. The recitals in the document as a whole and the intention of the executant and

acknowledgment thereof by the parties are conclusive. The Court has to find whether the document confers any interest in the property in praesenti

so as to take effect intra vivos and whether an irrevocable interest thereby, is created in favour of the recipient under the document, or whether the

executant intended to transfer the interest in the property only on the demise of the settlor. Those could be gathered from the recitals in the

document as a whole.

The document in this case described as "settlement deed" was to take effect on the date on which it was executed. The settlor created rights

thereunder intended to take effect from that date, the extent of the lands mentioned in the schedule with the boundaries mentioned thereunder. A

combined reading of the recitals in the document and also the schedule would clearly indicate that on the date when the document was executed

she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to

enjoyment, alienation etc. In other words, she had created in herself a life interest in the property in praesenti and vested the remainder in favour of

her second daughter. It is settled law that the executant while divesting herself

of the title to the property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on the settlor's demise. Thus the document in question could be construed rightly as a settlement deed but not as a Will. The settlor, having divested herself of the right and title thereunder, had, thereafter, no right to bequeath the same property in favour of her first daughter.

Areading of Ext. B-1 makes it absolutely clear that plaint A schedule property therein was obtained by Govindan under document No. 535/1954 and by his wife, the first appellant, under document No. 495/1120. Document No. 535/1954 by which Govindan derived the right or document No. 495/1120 by which first appellant derived right was not produced by either of the parties. It is hence not possible to find out what was the actual extent of the right obtained by Govindan and the first appellant under the respective documents. But Ext. B-1 and subsequent document executed by the executants of Ext. B-1 namely, Exts. A-1 and B-2, make it clear that Govindan was having one half right and first appellant was having the remaining one half right in A schedule properties shown in Ext. B-1, as was the case projected before the courts below. Ext. B-1 shows that it was jointly agreed by the executants that they shall jointly possess the properties and enjoy them jointly during their lifetime. It thereafter provides that, on the death of anyone of them, and A schedule properties are available then, the surviving executant shall possess the same absolutely with the right of alienation. It thereafter provides if on the death of the surviving executant, the properties are available, they shall go to their children, second appellant, respondent and Harshan, who is not a party to the suit. Therefore, though Ext. B-1 provides that the properties shall ultimately go to the children, there was no transfer of right, in praesenti in their favour. So also though it was provided that on the death of one of the executant properties shall go to the surviving executant, it is subject to the availability of the properties on the death of either of the executants. There was no transfer of the right of one of the executant, during his/her lifetime on the other. Thus there was no transfer of any right in praesenti on the other executant. Ext. B-1 shows that though properties are agreed to be enjoyed jointly during their lifetime, it does not prohibit alienation of the properties by the executants, either jointly or separately.

Instead it provides that the properties could be alienated and only if the properties are available at the time of the death of one of executants, it would go to the surviving executant, who would then get the properties on absolute right, with power of alienation. Even if by a document, the property which exclusively belongs to the executant is settled in favour of another, retaining his life interest in the property and providing that on his death the other would get absolute right in the property, it cannot be said that there was no transfer of interest in praesenti because of the retention of the life interest of the executant as there was a divesting of the rights of the executant, except his life interest. But the principle cannot be imported to the facts of the present case. In Hymavath's case (supra) Apex Court declared that it is the settled law that the executant while divesting herself of the title to the property could create a life estate for his enjoyment and the property would devolve on the settlee with absolute right on the settlors demise and it could be a valid settlement deed The position was reiterated in P.K. Mohan Ram Vs. B.N. Ananthachary and Others, and held:

A careful reading of Ext. A-2 shows that in the title itself the document has been described as Settlement Deed. By executing that document, Shri K. Perumal Iyer expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that "from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever". This was an unequivocal creation of right in favour of 16 persons in praesenti. Though, the beneficiaries were to become absolute owners of their respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof.

But the question is whether the executants have divested their right and retained only the life interest with them and thereby whether there was a valid transfer of right in praesenti, under Ext. B-1 by Govindan in favour of the first appellant. Ext. B-1 does not show any such transfer of right in praesenti. Therefore, Ext. B-1 could only be taken as a Will, as canvassed by the

learned counsel appearing for the appellants.

9. Then the question is whether Ext. B-1 is a joint mutual Will. As is clear from Ext.B1, it was executed by the husband and wife jointly. By Ext.

B-1 separate rights obtained by the husband and wife were retained as such during their lifetime and there is no divesting of the rights of the

husband to the wife or the rights of the wife to the husband. It only provides that during the lifetime of both the executants, the properties shall be in

their joint possession and shall be enjoyed together. Though it was argued by the learned counsel appearing for the appellants that thus a vested

right was created, as held by the Apex Court in Kokilambal's case (supra) the argument cannot be accepted. It is the settled law that in order to

find out the correct intent of the settlor, the settlement deed has to be read as a whole and has to draw inference from its content. The terms of the

settlement deed should be closely examined and the intention of the settlor should be given effect to. There could be complete vesting or contingent

vesting as provided under Sections 19 and 21 of Transfer of Property Act. The Honourable Supreme Court in Usha Subbarao Vs. B.E.

Vishveswariah and others, held:

An interest is said to be a vested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is

said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening

of the event or condition a contingent interest becomes a vested interest.

10. The terms of Ext B-1 are therefore to be borne in mind. Recitals in Ext. B-1 shows that though it was executed jointly by the husband and

wife, there was no mutual agreement between them to divest their individual right and to vest his or her right on the other. It only provides that

during their lifetime the properties shall be jointly possessed and enjoyed together. It does not provide for transfer of his or her right on the other

during their lifetime. It only provides that on the death of one of the executants, if the properties are available, they shall go to the surviving

executant to be enjoyed absolutely with even the power of alienation. Therefore, it is clear that there was no divesting of the rights of Govindan and

vesting that right on the first appellant or divesting the right of the first appellant and vesting of that right on Govindan. As Ext. B-1 provides that on

the death of both executants, if the properties are available, they shall go to their children, it is to be treated as a Will. Then it is to be settled

whether it is a joint Will or whether Ext. B-1 could be joint and mutual Will.

11. A joint Will is a single testamentary instrument constituting or containing the Will of two or more persons based on an agreement to make a

conjoint Will. Two or more persons can make a joint Will, which if properly executed by each so far as his property is concerned is as much his

Will. That Will comes into effect on his death. Joint Wills are revocable at any time by either of the testators during their life or after the

death of one of them by the survivor. If the joint Will is executed in pursuance of an agreement or contract between the executants to dispose of

their property to each other or the third person in a particular mode or manner and reciprocal in their provisions, it is a joint and mutual Will. It is to

emphasize and denote the contractual element which distinguishes it from a joint Will, it is described as ""mutual"" or ""reciprocal"". In a mutual Will

there is an agreement that neither of the testator shall have power to revoke it. The surviving testator receives benefits from the document under the

mutual Will and hence the survivor is not entitled to revoke the Will after the death of the first testator as the deceased had agreed in pursuance of

the agreement and hope and trust that the Will be adhered to by the survivor. As the Will takes effect only on the death of the testator, both the

testators during their lifetime together can revoke or modify the mutual Will. But on the death of one of the testators, the surviving testator is not

competent to revoke the mutual Will. The Will must be construed in its proper light. A definite agreement must be found on the terms of the Will,

that either of the joint executants would not revoke the Will after receiving the benefit under the Will. The dominant intention must be clear from the

tenor of the Will.

12. Honourable Supreme Court in Kochu Govindan's case (supra) considered the question whether a Will executed by the three persons jointly is

a joint Will or joint and mutual Will. The Will is extracted in the decision, which reveals that by the said Will it was provided that on the death of

the testators, their properties shall go to legatees shown in the Will. It also provides that except after their death, the legatees shall not lay claim to

any of the properties belonging to them and in the event of effecting any transfer

or alienation of the properties, either jointly or severally till their death, the legatees Will not get any right Construing the Will it was held that though there were three executants of the Will, each of them possesses the properties which were his or her self acquisitions and each of them could have executed a Will of his or her properties and if that had been done, the legatees named therein could undoubtedly claim right over those properties. Instead of executing three separate Wills the testators executed the Will jointly. Their Lordships construing the Will held, It is nevertheless, a Will by which each testator bequeathed properties belonging to him or to her, and therefore on the death of each testator, the legatees mentioned in the Will would be entitled to the properties of the testator, who dies.

Though it was argued that even though there are no words by which the executants divested themselves of their ownership and vested it on themselves jointly, there could be an implied divesting of rights, Their Lordship held that no such implied divesting could be read into the Will. It is advantageous to quote the relevant portion of the Will, which according to one of the parties, could be treated as an implied divesting of the right.

All the movable and immovable properties acquired jointly and separately by us till now, and those which we may be so acquiring in future and those which have devolved on us and those which we may yet be obtaining shall be held by under us in our possession and under our control.

Their Lordship held that clause 3 in that Will provides that the testator could alienate the properties jointly or severally and ""if the properties were intended to be impressed with the character of joint property, an alienation by any one of them singly would be incompetent"".

13. The recitals in Ext. B-1 establish that though it provides for joint possession of the properties during the lifetime of the executants, it does not provide for divesting of the rights of one of them on the other. Instead their independent rights and title were kept intact. The provision for joint possession during their lifetime, cannot be taken as an implied provision for divesting of the rights of any of the executants and vesting it on the other as canvassed by the learned counsel appearing for the appellants. On the other hand, Ext. B-1 provides for alienation, as it is unambiguously stated that only if the properties are available on the death of one of the

executant, the properties would go to the surviving executant. There is no provision in Ext. B-1 that such alienation shall be jointly. When Ext. B-1 does not provide for divesting of the rights of the executants and enables alienation of the respective rights of the executants without the junction of the other, it can only be found that, there was no divesting of the rights of Govindan or vesting of his rights on the first appellant.

14. Honourable Supreme Court in Dilharshankar's case (supra) considered the question whether the Will in that case is a joint Will or joint mutual

Will. Halsbury 's Laws of England, Fourth Edition Vol.50 at page 108 is quoted as follows:

221. Restrictions by taking a benefit under a mutual Will.--Mutual Wills may be made, either by a joint Will or by separate Wills, in pursuance of

an agreement that they are not to be revoked. Such an agreement may appear from the Wills, or may be proved outside the Wills, but it is not

established by the mere fact that the Wills are in identical terms. If no such agreement is shown, each party remains free to revoke his Will, if there

are separate Wills, or to revoke the joint Will, so far as it dispose of his property, and the fact that one party has died without revoking the

disposition of his property does not prevent the survivor from revoking the disposition which he has made notwithstanding that he has received

benefits out of the estate of the deceased party. Even when there is such an agreement and one party has died after departing from it by revoking

or altering the Will, the survivor having notice of the breach cannot claim to have the later Will set aside, since the notice gives him the chance of

altering the Will as regards his own property; and the death of the deceased party is itself sufficient notice for this purpose. If however, the

deceased has stood by the agreement and not revoked or altered his Will, the survivor is bound by it, and although probate will be granted of a

later Will made by him in breach of the agreement, since a Court of Probate is only concerned with the last Will, the personal representatives of the

survivor nevertheless hold his estate in trust to give effect to the provisions of the joint Will or mutual Wills.

Construing the Will it is held.

It would be evident from the said will that the joint properties of the deceased husband and the wife were delineated into three parts and each of

the parts were bequeathed to three grandsons in species i.e., in specific demarcated areas. One other significant fact to be borne in mind, in view of the contentions involved in this appeal/ is the fact that there was no provision in the Will whereby if one of the properties or one of the parts of the said properties was parted away or diminished before the death of both the executants (this is important because the Will was to take effect on the death of both the executants) there was no provision that any part which got diminished during the lifetime of one of the executants, he should be compensated otherwise from any other part of the said properties or any other assets of the estate of the executants which were the subject-matters of the Will.

It was thus found that the property in specific i.e., in specific proportion, was intended to be preserved and enjoyed by the ultimate legatee on the death of the survivor. Their Lordship then held:

50. Therefore the Will must be construed in its proper light and there must be definite agreement found from the tenor of the Will or aliunde that

either of the joint executants would not revoke the Will after receiving the benefit under the Will. Such definite agreement need not be express; it

can be implied. The terms of the Will have been set out exhaustively. It was undoubtedly a joint Will. The property in question has been described

as "our property". The expression "owner" has also been used in the manner indicated in the sentence "During our lifetime we shall continue to be

the joint owners of the land bungalow and blocks with their common bathroom and two privies..... and shall be jointly entitled to the rents and

income of the said land and blocks and the user and rent of the bungalow". The will goes on further to say that on the death of one of them the

survivor shall become the "owner of..... and shall become entitled to the rents and income and user of the said land bungalow and blocks

including garage.....". Therefore it is clear that the ownership which the joint executants contemplated was the user during the lifetime and

entitlement to the rents and income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the Will

thereafter goes on to say that "the provisions hereinafter contained shall become effective after the death of the survivor of us". And thereafter after

the death it is provided "we hereby devise and bequeath our said furnished

bungalow.....". The gift of the property to the three grand children as Owners in full sense is to take effect on the death of the survivor of both the executants. It is clear that the property was intended to be kept in fact for the enjoyment of the ultimate legatees and during the lifetime of either of them the property would not in any way be parted with or diminished. This intention, expressed in the implied terms in the bargain in the Will, in our opinion, would be fortified by devising the property to three grand children in species i.e., in specific form and not providing for any money or compensation for diminution of any part thereof before coming into effect of the Will in question. If that is the position then, in our opinion, there is a definite Agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the death of either of them.

51. Indubitably in the instant case the husband has received the benefit under the Will of the wife. He could not have during his lifetime parted with the property i.e., he did not have the disposing power over the properties in question after the death of the wife.

15. Even if a mutual Will was executed by the husband and wife, in the absence of a provision prohibiting revocation, it cannot be said that during the lifetime of both the executants of the mutual Will, the other is incompetent to revoke the Will. Even if one of them revokes the Will, without intimation to the other testator, during their lifetime, it cannot be said that an alienation made by one of them during the lifetime of the other would be invalid, as the surviving executant would definitely have the liberty to modify the Will as he or she wishes.

16. Therefore, when Ext. B-1 does not provide that the executants of Ext. B-1 have no right of revocation and there is no divesting of the rights of one of the executant and vesting of the rights on the other, argument that Ext. B-1 is a mutual Will cannot be accepted. If that be so, Ext. B-1 can only be treated as a joint Will. It is not a joint and mutual Will. The result is that it is to be treated as two separate Wills executed by the husband and wife, which would come into effect on their respective deaths. If that be so, any of the executant is competent to execute another Will during his or her lifetime or transfer his or her right by executing a gift deed or settlement deed or sale deed. Viewed in that angle, it cannot be said that

Govindan has no right to transfer his rights under Ext. A-I in favour of the respondent as canvassed by the appellants. Under Ext. A-1 Govindan transferred his rights in favour of the respondent. It is legally valid. Hence respondent is definitely entitled to get one half share, which was available with Govindan, in spite of execution of Ext. B-1. Govindan admittedly died on 2-5-1995. Though under Ext. B-2 settlement deed executed by the first appellant, she claimed that as provided under Ext. B-1, on the death of Govindan his rights vested on her, such vesting could be there only if the rights of Govindan was available with him at the time of the death of Govindan. When under Ext. A-1 sale deed dated 25-2-1995, Govindan had already transferred his rights in favour of the respondent, on the death of Govindan, first appellant cannot claim the rights of Govindan in the plaint schedule properties, as that right vested with the respondent under Ext. A-1 on 25-2-1995 itself.

17. Learned counsel also argued that when Ext. B-1 provides that from the date of execution of Ext. B-1, properties shall be in the joint

possession of Govindan and his wife and hence it is a transfer in praesenti, I cannot agree. Even if Ext. B-1 was not executed, possession of the

properties could only be joint possession by the husband and the wife. What is stated in Ext. B-1 is that properties were obtained by Govindan

under document No. 535/1954 and by the first appellant under document No. 495/1120. Therefore, joint possession was not created under Ext.

B-1.

It was the position, even before execution of Ext. B-1. Therefore, based on the joint possession provided in Ext B-1, it is not possible to hold that

there was a transfer in praesenti. It was also argued that as husband and wife jointly decided to execute the joint Will in favour of their three

children, and as Ext. B-1 is a Will, the last clause in the Will alone will prevail. Though children of the executants of Ext. B-1 are the legatees, Ext.

B-1 makes it clear that the legatees could get the properties only if they are available on the death of the testators. When Ext. B-1 provides that on

the death of one of the executants, the surviving executant would get the property, absolutely, only if it is available, as has not been alienated earlier

and the surviving executant was granted absolute right, including right of alienation, the legatees could claim the properties only if properties are

available on the death of both the executants. When, one of the executant during his life time alienated his rights in the properties, it cannot be said that because of the last clause in Ext. B-1, the testator had no right of alienation. Though learned counsel appearing for the appellants also argued that the intention of the executant was to create joint interest as is clear from (he recitals in Exts. A-1 and B-1, as both the husband and the wife treated the properties jointly belonging to them, I cannot agree. Unless there was divesting of the exclusive right and vesting of the right on the other there cannot be a joint right as cancelled. Learned counsel appearing for the respondent pointed out that as is clear from Ext. B-2, executed by the first appellant, she never treated Ext. B-1 as a joint and mutual Will. Even if it is a joint and mutual Will, during the life time of the wife and husband, one of the testators, is competent to alienate the property or even to modify the testament. In that event the wife, the other executant is also competent to modify her Will as she wishes. That does not mean that the husband has no right to alienate the property or that Ext A-1 is invalid. Respondent is definitely entitled to claim one half share under Ext. A-1. The substantial questions of law are answered as follows.

Ext B-1 does not prohibit the rights of Govindan to alienate his rights. There is no restriction of the right of Govindan to alienate his rights without the junction of the first appellant. Ext. B-1 did not create any absolute right on the first appellant, during the life time of Govindan, to the extent of the rights of Govindan. The first appellate court rightly found that respondent is entitled to one half right in the plaint schedule properties.