

(2016) 04 KL CK 0001
In the High Court Of Kerala
Case No : R.S.A. No. 626 of 2013

Sarojini

APPELLANT

Vs

Radha

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2016) 3 ILRKerala 495 : (2016) 3 KHC 679 : (2016) 4 KLT 20

Hon'ble Judges : Mr. P.B. Suresh Kumar, J.

Bench : Single Bench

Advocate : Sri. B. Krishnan and Sri. Parthasarathy, Advocates, for the Appellant;
Sri. K.K. Ravindranath, Sri. T.C. Suresh Menon, Sri. P.N. Sukumaran, Sri. P.S.
Appu and Sri. P. Sasi, Advocates, for the Respondent

Final Decision : Partly Allowed

Judgement

1. The defeated plaintiff in a suit for partition is the appellant in this second appeal.

2. The facts relevant for decision are the following:

The suit properties belonged to one Gopala Kurup. He assigned the same to his mother Ammalu Amma and sister Devi Amma, the 10th defendant. Later, Ammalu Amma died leaving behind Gopala Kurup and the 10th defendant as her legal representatives. Thereafter, Gopala Kurup also died. The plaintiff is a daughter of Gopala Kurup and defendants 1 to 8 are the remaining legal representatives of Gopala Kurup. There is a temple in the properties sought to be partitioned. The 9th defendant is the society managing the affairs of the said temple. The case of the plaintiff is that on the death of Ammalu Amma, ?th share in the suit properties devolved on Gopala Kurup and on the death of Gopala Kurup, the plaintiff and defendants 1 to 8 became entitled to the said ? share. According to the plaintiff, she and defendants 1 to 8 are, therefore, entitled to 1/38th share each in the suit properties. The suit is, therefore, filed for partition

of the said 1/38th share of the plaintiff.

3. Defendants 1 to 8 remained ex-parte. The 10th defendant contested the suit contending mainly that Ammalu Amma had executed Ext.B1 gift deed in respect of her share in the suit properties in favour of the 10th defendant and thus on her death, the 10th defendant became the absolute owner of the suit properties.

4. The trial court accepted the case of the 10th defendant and dismissed the suit. The plaintiff took up the matter in appeal. The 10th defendant died pending appeal. Ext.B1 relied on by the 10th defendant contains a recital that after the death of the 10th defendant, the properties would devolve on the female children of the sister of Ammalu Amma, namely, Mani Amma. The said recital in Ext.B1 reads thus:

VERNACULAR MATTER

In the light of the said recital, on the death of the 10th defendant, the only daughter Mani Amma got herself impleaded in the appeal as the additional 13th defendant. In view of the death of the 10th defendant, the only contention raised by the plaintiff in the appeal was that in the light of the said recital in Ext.B1 gift deed, the 10th defendant had only a life interest in respect of the ? share of Ammalu Amma in the suit properties and that on the death of the 10th defendant, the said ? share of Ammalu Amma became vested with the additional 13th defendant. On that basis, it is seen that the plaintiff has entered into a compromise also with the additional 13th respondent in the appeal in respect of the suit properties and a compromise petition as I.A.No.1197 of 2012 has also been filed. I.A.No. 1197 of 2012 was opposed by the legal representatives of the deceased 10th defendant contending that the share of Ammalu Amma in the suit properties has been transferred absolutely to the 10th defendant by virtue of Ext.B1 gift deed and as such, on her death, the said share also became vested with the children of the 10th defendant along with the remaining share of the 10th defendant. The appellate court considered the rival claims of the parties and held that Ext.B1 gift deed is an absolute gift in respect of the ? share of Ammalu Amma in the suit properties in favour of the 10th defendant and that the clause in Ext.B1 relied on by the plaintiff and the additional 13th defendant being one repugnant to the absolute estate created in favour of the 10th defendant is void. Consequently, the appellate court dismissed the appeal rejecting the said contention of the plaintiff. Hence this second appeal.

5. Heard the learned counsel for the appellant as also the learned counsel for the respondents.

6. The learned counsel for the appellant, relying on the recital in Ext.B1 extracted above, contended that in the light of the said recital, it can only be said that the 10th defendant had only a life interest in respect of the ? share of Ammalu Amma in the suit properties and that the absolute interest in the properties was intended to be given only to the female children of Mani Amma. In other words, the contention of the learned counsel for the appellant is that the

clause in Ext. B1 relied on by the plaintiff is not a repugnant clause, but only a defeasance clause. As such, according to the learned counsel, the lower appellate court ought to have disposed of the appeal accepting the compromise petition filed by the appellant and the additional 13th defendant in the appeal.

7. Per contra, the learned counsel for the respondents contended that the recitals in Ext. B1 document, if understood in its entirety, would indicate beyond doubt that the intention of Ammalu Amma while executing Ext. B1 document was to create an absolute interest in respect of her ? share in the suit properties in favour of the 10th defendant. As such, according to the learned counsel, the recital in Ext. B1 relied on by the plaintiff can only be construed as a repugnant clause and hence void.

8. In the light of the rival submissions made at the Bar, the only question arises for consideration is as to whether the clause in Ext. B1 relied on by the plaintiff is a repugnant clause or a defeasance clause. To resolve the said question, it is necessary to understand the nature of interest created as per Ext. B1 in favour of the 10th defendant. The relevant portion of Ext. B1 reads thus:

VERNACULAR MATTER

It is trite that after conferring an absolute estate in favour of the donee, the legal incidents of such an estate cannot be controlled or regulated by the donor. It is also trite that any such provision in the deed of gift will be repugnant to the absolute estate created in favour of the donee and to the legal incidents of such an estate and as such, the provision will be ineffective and wholly void. [See *Bai Kevli v. Dalsukhram Sakarchand* (AIR 1945 Bombay 178), *Minor Krishnaswami by grandmother and next friend, Pankajammal v. Minor Srinivasan and others* (AIR 1945 Madras 362) and *Pugalumperumal Pillai v. Thangathammal* (AIR 1949 Madras 690)]. As far as the present case is concerned, the recitals in the document as extracted above would indicate beyond doubt that the intention of the donor was to give the property absolutely to the 10th defendant. If the intention of the donor was to give the property absolutely to the 10th defendant, as held in the decision referred to above, the clause relied on by the plaintiff can only be held to be repugnant and hence void.

9. A defeasance clause is a clause which imposes a condition upon the fulfilment of which a deed or other instrument is defeated or made void. The distinction between a defeasance clause and a repugnant clause is that where the intention of the donor is to maintain the absolute estate conferred on the donee, but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void, but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative. [see *Govindaraja Pillai v. Mangalam Pillai* (1933 Madras 80)]. The logic

behind the said view is that Section 28 of the Transfer of Property Act expressly allows gift on an interest in favour of a donor subject to condition that on the happening of a specified uncertain event, the interest shall pass on to another person. As far as the present case is concerned, as noted above, the recitals in Ext.B1 would indicate beyond doubt that the interest on the ? share of Ammalu Amma in the suit properties has been absolutely vested with the 10th defendant and the said vesting was not expressly or impliedly made subject to defeasance on the happening of a contingency. The clause relied on by the appellant, in the circumstances, cannot be understood as a clause which would come within the purview of Section 28 of the Transfer of Property Act. As such, the said clause cannot be construed as a defeasance clause.

10. The learned counsel for the appellant, relying on the decision of the Apex Court in Ramachandra Shenoy v. Hilda Brite (AIR 1964 SC 1323) contended that to the extent it is legally possible, effect should be given to every disposition contained in a document unless the law prevents effect being given to it. According to the learned counsel, if one attempts to give effect to the clause relied on by the plaintiff in Ext.B1, it can only be said that what was intended to be given to the 10th defendant as per the said document was only a life interest in respect of the ? share of Ammalu Amma. I do not agree. First of all, Ramachandra Shenoy v. Hilda Brite (supra) is a case dealing with the interpretation of a Will and the principle referred to therein is a principle governing the construction of Wills. According to me, the principles laid down by the Apex Court in the said case cannot be applied as such to a case of gift where essentially the question is as to whether a particular clause contained therein is a repugnant clause or a defeasance clause.

11. The second appeal, in the said circumstances, is devoid of merits and the same is accordingly dismissed.