

(1985) 01 KL CK 0007
In the High Court Of Kerala
Case No : S.A. No. 372 of 1979-E

Vannathi Valappil Janaki and Others

APPELLANT

Vs

Puthiya Purayil Paru and Others

RESPONDENT

Date of Decision : 11-01-1985

Acts Referred:

Kerala Land Reforms Act, 1963 — Section 72
Transfer of Property Act, 1882 — Section 122, 126

Citation : AIR 1986 Ker 110

Hon'ble Judges : Varghese Kalliat, J

Bench : Single Bench

Advocate : V.P. Mohan Kumar and V. Ram Kumar, for the Appellant; Govinda Bharathan, P.V. Madhavan Nambiar and K.L. Mohanachandran, for the Respondent

Final Decision : Dismissed

Judgement

Varghese Kalliat, J.—This is an appeal by defendants 2 to 7, 11 and 12. The plaintiffs filed a suit for partition and recovery of plaintiff's 2/4 share in the plaint schedule properties.

2. The plaint schedule properties originally belonged to three persons by name Koran, Kunhiraman and Manikkam. The properties were acquired by the above said three persons under Ext. B-1. It is dt. 19-4-1943. The plaintiffs claim that the properties were gifted to four persons by the original owners under Ext. B-2, which is same as Ext. A-1, This gift deed is dt. 15-1-1946. The plaintiffs claim title to and right of partition of the properties as per Ext. A-1. The contesting defendants submit that Ext. A-1 gift was cancelled by the donors. The cancellation is evidenced by document Ext. B-3. It is same as Ext. A-5. This document is dt. 8-8-1960. Further they submit that they are in possession of the properties with absolute title to the properties by virtue of three assignment deeds Ext. A-6, A-7, and B-4. All these documents are also on the same date, viz. 8-8-1960. The contesting defendants also relied on three purchase certificates they have obtained subsequent to the institution of the suit, Exts.

B-16, B-17 and B-24.

3. The trial Court recorded a finding that there was a valid cancellation of the gift Ext. A-1. Since there was a valid cancellation of gift Ext. A-1, the donors acquired the right to transfer the properties. The donors assigned the properties to the contesting defendants by documents evidenced as Ext. B-4, A-6 and A-7. On the above finding the trial Court dismissed the suit.

4. The defeated plaintiffs filed an appeal before the Subordinate Judge's Court, Tellicherry. The appellate Court said that the gift was irrevocable at the time when it was said to have been revoked by the donors. The donors had no transferable right in the properties. So the donors' assignments granted no interest in the properties to the contesting defendants. The Court held that the properties are liable to be partitioned. The finding recorded by the trial Court was reversed and the suit was decreed, passing a preliminary decree for partition. Now the contesting defendants appeal to this Court.

5. The counsel for the appellants and respondents argued their case very ably. The counsel for the appellants Mr. Sankara Menon raised two questions before me. He submitted that the finding of the appellate Court that there was no valid revocation of the gift is unsustainable in law. According to him there is absolutely no evidence of the acceptance of the gift. He further submits that the learned Sub Judge did not keep in mind the guidelines and principles laid down by the Supreme Court as well as other High Courts in the matter. He submits that legal evidence in regard to the acceptance of gift is nil and whatever scarce evidence -- not legal -- has been appreciated perversely by the appellate Court. The counsel for the respondents submits that there is clear and clinching evidence before the Court to come to a conclusion that the gift was revoked at a time when it was irrevocable since the gift was accepted by the donees before the date of Ext. B-3. The counsel on both sides cited before me several decisions on the question of acceptance of gift. I think it is not necessary for me to refer to all those decisions in detail or in brief, since the principles are well settled. At this point, I would like to say that though the counsel for the appellants in his appeal memorandum raised two questions based on the findings of the appellate Court as to the acceptance of the gift, this Court at the time of admission did not issue notice on those questions. This Court issued notice only on the following question:

"In view of Exts. B-16 and B-17 obtained u/s 72(K) of the KLR Act are not the plaintiffs barred under law from recovering their share in the properties comprised therein."

Any how since the counsel insisted me to examine the correctness of the finding recorded by the appellate Court that the gift deed was accepted before it was revoked, I examined the question. It has to be remembered that Ext. A-1 is dt. 15-1-1946. The alleged cancellation was only in 1960 by Ext. B-3 dt. 8-8-1960. The gift is not onerous. The donors are the direct uncles of the donees. There is absolutely no reason for thinking that the gift was made in secrecy. No peculiar

circumstance has been brought to my notice for such an unusual conduct. Counsel no doubt strongly contended that the execution of the gift deed was not known to the donees.

6. considering the normal human conduct, I feel that I should draw an inference taking into account the overall circumstances that there is absolutely no reason for me to believe that the donees never came to know about the gift. The counsel for the appellants submits that there is no convincing evidence in the case to say that the donees came to know about the gift deed. On an overall view of the evidence in the case I think the counsel is not correct in this submission. There is absolutely no reason as stated earlier for the donor to hide (from) the donees about the gift deed. I say so, because there is positive and clear indication available from the terms of the cancellation deed that the donees were aware of the gift before its cancellation. Now I shall refer to the relevant recitals in Ext. A-5 cancellation deed. In Ext. A-5 the donors have stated thus :--

*(.....)

7. The abovequoted statement in the cancellation deed according to me gives a sure indication that the gift deed took effect and that what was expected of by the donors from the donees as recompense for the gift, the donors never received. The donees were not bestowing proper love and affection towards the donors and that necessitated the cancellation of the gift deed. What the donors say is significant. They say that to allow the continued existence of the gift *(.....,) will endanger their future safety *(.....). This statement in Ext. A-5 according to me is a complete answer to the plea of the defendants, and will shatter their contention that the gift has not been accepted by the donees.

8. The statement in the cancellation deed reveals that the donors felt that it was due to a want of foresight and an imprudence on their part such a deed was executed by them, but their folly will not clothe them with the power of revocation of the gift. Bindley, C.J. in Allcard v. Skinner (1887) 36 Ch D 145 observed :-

"Courts of equity have never set aside gifts on the ground of folly, imprudence or want of foresight on the part of the donors. The Courts have always repudiated any such jurisdiction."

9. In 1973 Ker LT 961 (Narayani Bhanumathi v. Lelitha Bai, P. Subramonian Potti, J. as he then was held that only slight evidence is sufficient for establishing the fact of acceptance of a gift when the gift is not an onerous gift. The learned Judge has come to this decision taking into account the normal human conduct. The sensible and pragmatic approach of the learned Judge is seen amply revealed from what I quote hereunder:

"Normally, when a person gifts properties to another and it is not an onerous gift, one may expect the other to accept such a gift when once it comes to his knowledge, since normally, any person would be only too willing to promote his

own interests."

10. Nothing has been stated in the present case that there was some reason for the donees not to accept the gift. Certainly the acceptance of the gift will only promote their own interest. The learned Judge (Subramonian Potti, J.) has also observed:

"It is only normal to assume that the donees would have accepted the gift deed. Mere silence may sometimes be indicative of acceptance provided it is shown that the donee knew about the gift."

I fully agree with the observations of Potti, J. I take note of the observations - "mere silence may sometimes be indicative of acceptance". In Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, , a learned single Judge of the Madras High Court, Satyanarayana Rao, J. observed : --

"Acceptance may be implied but the facts relied on to draw an inference of acceptance must be acts of positive conduct on the part of the donee or persons acting on his behalf and not merely passive acquiescence, such as standing by when the deed was executed or was registered."

This observation is directly in conflict with what this court has held in 1973 Ker LT 961. I respectfully agree with what Subramonian Potti, J. has said and I doubt the correctness of the decision reported in Chennupati Venkatasubbamma Vs. Nelluri Narayanaswami, . The principles stated in 1973 Ker LT 961 truly reflect the principles stated in Hill v. Wilson (1873) 8 Ch App 888.

"It requires the assent of both minds to make a gift as it does to make a contract. No doubt you may infer that a person has assented to that which is obviously for his benefit on slighter evidence than would be required to show that he assented to a contract which may be to his prejudice."

Mulla on Transfer of Property Act, 6th Ed. page 786.

"But though the rules of English law stated above do not all apply in India, there is nothing in the Section to show that the acceptance under this Section should be express."

No express acceptance is necessary for completing a gift is a well accepted proposition of law. The overall circumstances of the case and the normal human conduct will certainly guide the Judge in this matter. In this case as I stated earlier, the gift was in the year 1946 and there is absolutely no circumstance to indicate that the donees did not accept the gift. I see no merit in the contention. The finding of the appellate court is certainly sensible and sustainable.

11. When once it is found that the gift is valid the effect of it is that the contesting defendants are also co-owners with the plaintiffs. Now it is seen that some of the co-owners viz., the appellants have got purchase certificates in regard to a lease hold property belonging to all the co-owners. I have to decide the effect of such purchase certificates. In Karbalai Begum Vs. Mohd. Sayeed and

Another, All, J. held :

"It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that the defendants being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees."

I feel no doubt to hold that the contesting defendants in their capacity as co-owners acted as constructive trustees of the plaintiff and other defendants when they obtained the purchase certificates. This position has been accepted by Paripoornan, J. in 1984 Ker LJ 764 : AIR 1985 (NOC) 23, Kundathodi Saidali v. Kappil Amina Umma the learned Judge observed :

"That apart, once it is admitted or proved or found that the original lease of the plaint items was in favour of Kunhahammed and the renewal was in favour of Kunhahammed and 1st defendant, Kunhahammed and his heirs will be co-owners along with the 1st defendant. Even though the heirs of Kunhahammed (plaintiffs) were not eo nomine parties to the proceedings evidenced by Ext. B-14, as long as the certificates evidenced by Exts. B-7 and B-13 were obtained by the 1st defendant, who was only a co-owner, the rights obtained will certainly enure to the benefit of the heirs of Kunhahammed as well. This follows in view of the fact that a co-owner in possession will be treated as a trustee as held by the Supreme Court in the decision reported in Karbalai Begum Vs. Mohd. Sayeed and Another, .

In 1981 Ker LT 639, Kochu Lakshmi v. Velayudhan a Division Bench of this Court approved and quoted the following observation in 1979 Ker LT 412 : AIR 1979 Ker 195 :

"I feel constrained to make the following observations about Section 72F. If Section 72F(2) had stood by itself without its ambit being curtailed by Section 72F(3), most of the difficulties that Courts experience in dealing with purchase certificates could have been avoided. It is the existence of Section 72F(3) that contributes not only to the confusion but for various kinds of unhealthy, unwholesome and undesirable practices, Section 72F(2) makes it mandatory on the Land Tribunal to issue notice individually and to all persons interested in the land. The effect of this has been taken away by Section 72F(3) by the introduction of a non obstante clause which provides that notwithstanding anything contained in Section 72F(2), the notice referred to in Sub-section (1) shall be deemed to be sufficient notice to the landowner etc. In fact the effect of Section 72F(2) is destroyed by Section 72F(3). If Section 72F(3) was properly and happily worded, giving power on the Land Tribunals to resort to this sub-section after being satisfied that notice as provided u/s 72F(2), in a given case, was attempted to be served and that service was impracticable, then no complaint can be made against a purchase certificate. That is not how Section 72

is used or misused. Land Tribunals now resort to Section 72F(3) remedy, throwing to the winds all salutary principles of procedure and issue purchase certificates in quick succession, heedless of the consequences and the havoc they cause. Cases are not rare when Land Tribunals have issued purchase certificates for the very same property to two rival claimants within an interval of short period. Therefore, it is necessary to put a harmonious construction to Section 72F(2) and (3). According to me, it is necessary for Courts, with this Sub-section 72F(3) on statute book, which cannot be struck down as being violative of natural justice, to read it down and to hold that it will come into operation only when individual notices contemplated in Section 72F(2) become impracticable in the manner provided under the general law. Otherwise, the wide manner in which Section 72F(3) is would give room for unscrupulous person in charge of litigations and even Tribunals invested with the power to decide cases to resort to dishonest methods to secure orders dishonestly under circumstances which can better be imagined than stated".

In the light of the weighty observations quoted above I feel no doubt to hold that even if the purchase certificates are valid, it will certainly enure to the benefit of the other co-owner including the plaintiffs. The contesting defendants cannot have any special right derogative of the rights of the plaintiffs by virtue of the purchase certificate. In the result I see no merit in the appeal and it is only to be dismissed. I dismiss the appeal. No order as to costs.