S. Thiagarajan Vs Saraswathy Kittu and 6 others

Court: Madras High Court

Date of Decision: Sept. 10, 1999

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 145, 146
Specific Relief Act, 1877 â€" Section 42
Specific Relief Act, 1963 â€" Section 34
Transfer of Property Act, 1882 â€" Section 122, 123, 126, 41

Citation: (1999) 3 CTC 217 : (2000) 1 RCR(Civil) 594

Hon'ble Judges: R. Balasubramanian, J

Bench: Single Bench

Advocate: Mr. N.S. Varadhachari, for the Appellant; Mrs. Hema Sampath, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. The first defendant in O.S.No. 54 of 1986 on the file of the Sub-Judge, Villupuram is the appellant in this appeal; the plaintiff in that suit is the

first respondent herein and defendants 2 to 7 are the other respondents in this appeal. It is stated before this Court at the time of argument that the

second defendant is no more and her legal representatives are the appellant and the first respondent herein. However the fact remains that no steps

have been taken to have the legal representatives of the deceased second respondent recorded in this appeal. In this judgment the parties to the

appeal will hereinafter be referred to as the plaintiff and the defendants. The suit was filed for declaration of title; for an injunction restraining the

first and the second defendants from alienating the suit property; restraining defendants 3, 4, 6 and 7 from paying the rent to defendants 1 and 2

and for other incidental reliefs. On merits the learned trial Judge granted a declaratory decree as prayed for, but however denied the plaintiff the

relief of injunction as prayed for by her in the manner referred to above. Aggrieved over the declaratory decree granted by the learned trial Judge,

the first defendant is before this court in this appeal. As far as that portion of the decree of the lower court negativing the relief of injunction, the

plaintiff had filed the cross objections in the pending appeal.

2. The facts on which the plaintiff went before the lower court can be briefly stated as follows:

One Subbarayan (since deceased) is the husband of the second defendant. The plaintiff is their daughter and the first defendant is their son.

Defendants 3 to 7 are the tenants occupying various portions of the house properly described in Schedule "A" to the plaint. Schedule "A" property

originally belonged to one Chellam. He executed a registered ""will"" on 20.7.1915 in favour of Subbarayan and his brother Gopal. Gopal died

leaving behind his sons Muthukrishnan and Haridoss. As the sons of Gopal were very young at the time of their father"s death, both of them came

into the care and custody of the second defendant and her husband. On 30.11.1975 there was a partition, to which Subbarayan, the second

defendant and the sons of Gopal were parties. Schedule `A" property shown in the plaint is described as Schedule "B" property in that partition

deed. That property namely Schedule "B" property in the partition deed was allotted to the second defendant. Schedule "A" and Schedule "C"

properties to the partition deed were allotted to Subbarayan and the heirs of Gopal respectively. Since the date of partition the sharers were

enjoying their properties separately. Schedule "B" property in the plaint (landed property) was purchased by the second defendant with her own

funds. She is therefore the absolute owner of the "B" Schedule property besides the `A" Schedule property. On 22.10.1982 the second defendant

executed a settlement deed in favour of the plaintiff out of love and affection in respect of the suit properties. The second defendant continued to

live with the plaintiff after the death of her husband. The settlement deed was duly executed, validly attested and acted upon. After the settlement

deed, the plaintiff executed a mortgage deed, in favour of one Veerapan in respect of "B" Schedule property on 29.10.1984. The plaintiff

accepted the settlement deed and the same was acted upon. The first defendant has nothing to do with the suit properties and he is denying the

plaintiff"s title to the same. He is also the attempting to sell the suit properties. Having regard to the relationship between the parties, the first and

the second defendants were asked by the plaintiff to collect the rent from defendants 3 to 7. In respect of the "A" Schedule property the tenant

were inducted into possession by the second defendant even before the settlement deed. The 5th defendant is paying rent now to the plaintiff.

Defendants 3, 4, 6 and 7 are refusing to pay the rent to the plaintiff colluding with the first defendant. The first defendant had wrongfully sold the

electric motor pump set installed in the `B" Schedule property. The first defendant by exercising undue influence, coercion and threat seems to

have obtained a revocation deed dated 5.9.1983 from the second defendant revoking the settlement deed in favour of the plaintiff. The revocation

deed is not worth the paper on which it is prepared. The plaintiff issued a notice on 25.9.1983 to the defendants. All the notices except the notices

addressed to the second defendant were managed to be returned. The first defendant alone without the knowledge of the second defendant

received the notice and sent a reply with full of false and untenable allegations. Hence the suit for the reliefs prayed for as mentioned in the earlier

portion of the judgment.

3. The first defendant filed a written statement contending inter alia as follows:

The ""will"" dated 20.7.1915 is true and valid. The partition on 30.11.1975 is also true and valid. However it is denied that the second defendant is

the absolute owner of ''B'' Schedule property. The suit properties were purchased in the name of the second defendant by her husband. Thereafter

the second defendant had been enjoying the suit properties on her own right. The plaintiff took the second defendant to Madras under the pretext

of treating her eye and at that time by playing a fraud on the second defendant she got the settlement deed dated 22.10.1982 executed by the

second defendant and registered the same at Madras. This, the second defendant came to know when she later on attempted to sell her properties

and when encumbrance certificate was applied for. At that time the second defendant stated that by playing a fraud on her, the plaintiff got the

settlement deed executed. Thus the second defendant revoked the earlier settlement deed by Deed of Revocation dated 5.9.1983. The plaintiff

never enjoyed the properties covered under the settlement deed, which are in her favour. The settlement deed did not come into effect. The entire

suit properties were enjoyed by the second and the first defendant as joint family properties. On 29.9.1983 the second defendant executed a

release deed in respect of the suit properties in favour of the first defendant for a consideration of Rs. 15,000. Therefore the first defendant alone is

the absolute owner of the entire suit properties. The plaintiff never took possession of the properties comprised in the settlement deed in her favour

and she never enjoyed it also. The induction of defendants 3 to 7 by the second defendant in respect of the ''A'' Schedule property and the

payment of rent by the 5th defendant to the plaintiff are denied. The 5th defendant is paying the rent to the second defendant on the directions

given by him and not otherwise. Defendants 3, 4 and 7 are paying the rent to the first defendant. The 6th defendant had vacated the premises long

before and handed over vacant possession to the first defendant. The sale of the electric motor in the ''B'' Schedule property is denied. The

revocation deed dated 5.9.1983 was voluntarily executed by the second defendant. To the suit notice issued on behalf of the plaintiff, the first and

the second defendants had sent separate replies through their lawyers. The same may be treated as part and parcel of the pleading.

4. The second defendant filed a written statement contending inter alia as follows:

It is true that the second defendant executed a settlement deed in favour of the plaintiff on 22.10.1982; the plaintiff accepted the same and it was

acted upon. The second defendant executed the settlement deed in favour of the plaintiff out of love and affection while she was in a sound and

disposing state of mind. After the settlement deed was executed, the second defendant was residing in the "A" Schedule property. While so, the

first defendant beat her; threatened her and obtained a cancellation deed forcibly against her wish under threat and coercion. The second defendant

intended to cancel the settlement deed in favour of the plaintiff. "B" Schedule property was purchased by this defendant from her own funds. The

suit properties are the exclusive properties of the second defendant and so she rightly, out of her own volition, will and affection executed the

settlement deed in favour of the plaintiff. The second defendant was looked after only by the plaintiff. The suit therefore may be decreed without

costs as far as the second defendant is concerned. Defendants 3 to 7 remained ex parte.

5. On the side of the plaintiff four witnesses were examined as P.Ws. 1 to 4; P.W.1 is the plaintiff and P.W.2 is the 7th defendant. 18 exhibits

were marked on the side of the plaintiff as Exs.A1 to A.18. On the side of the defendants three witnesses were examined as D.Ws. 1 to 3. D.W.1

is the first defendant and D.W.3 is the second defendant. As many as 14 exhibits were marked on the side of the defendants namely, Exs. B.1 to

B.14. On the pleadings and the materials placed, the learned trial Judge framed the following issues:

(a) Whether the suit properties are the separate properties of the second defendant?

(b) Whether the settlement deed dated 22.10.1982 is true, valid and acted upon?

(c) Whether the cancellation deed dated 5.9.1993 is true, valid and binding on the plaintiff?

(d) Whether the release deed dated 29.9.1983 executed by the defendant in favour of the first defendant is true and valid and whether it binds the

plaintiff?

(e) Whether the plaintiff is entitled to the declaratory relief:

(f) Whether the plaintiff is entitled to a decree for injunction as prayed for?

(g) To what other reliefs the parties are entitled to?

The learned trial Judge on the materials available on record, found that the revocation deed and the release deed are not true and valid and the

plaintiff is not bound by it. The learned trial Judge also found that the suit properties belong to the plaintiff and she is entitled to the declaratory

relief. However on the issue regarding injunction, the learned trial Judge found that the plaintiff had not established possession of the suit properties

on the date of the suit and therefore she is not entitled to the relief of injunction as prayed for by her. The settlement deed in favour of the plaintiff

was upheld. Her liberty for recovery was reserved. As already stated the correctness of the said judgment is being questioned in this appeal by the

first defendant. In the cross-objections the plaintiff is canvassing the correctness of the judgment rejecting the injunction relief.

6. Mr.N.S. Varadhachari, learned counsel for the appellant would submit the following points:

Mere declaratory suit without asking for the further relief of possession from the defendants, in view of the finding rendered by the learned trial

Judge that the plaintiff had not established possession, has to necessarily fail since in such a suit the court''s power to grant the declaration as

prayed for is taken away by the proviso to section 34 of the Specific Relief Act, 1963 (hereinafter referred to as the Act). Therefore in view of the

finding rendered by the learned trial Judge on the issue that the plaintiff not being in possession, this court has to necessarily allow the appeal and

dismiss the suit relying upon section 34 of the said Act Ex.A.1, the settlement deed in favour of the plaintiff was brought about by her in suspicious

circumstances and the execution of the same is not free from doubt. If the due execution of the settlement deed is not established, then no right

whatsoever would flow to the plaintiff from the said settlement deed. The plaintiff was residing at Pondicherry and the second defendant was

residing at Villupuram and as such, if really the second defendant wanted to execute the settlement deed in favour of the plaintiff out of her own

volition and inclination, then she could have easily executed the same either at Villupuram Town itself or if need arises at Pondicherry. There is

absolutely no reason as to why the second defendant should go all the way to Madras to execute the settlement deed in favour of the plaintiff and

register the same at Madras. The identifying witness namely, P.W.3 is from Villupuram Town and there was no need for him to travel to Madras

solely for the purpose of identifying the signature of the second defendant before the registering authority. P.W.2 is very much interested in the

plaintiff and therefore these circumstances cumulatively would go to show that the settlement deed in favour of the plaintiff was brought about in

suspicious circumstances. The plaintiff had not accepted the settlement deed and taken possession of the properties. The settlement deed in favour

of the plaintiff never came into force. The records available establish beyond doubt that the first and the second defendants alone continued to be in

possession of the properties and it is they, who exercised all their rights as owners thereof. There is no mutation of records for the suit properties in

favour of the plaintiff. The property tax and the land revenue were paid only by the defendants and there is no mutation in the records of the

plaintiff''s name.

7. Mrs. Hema Sampath, learned counsel for the first respondent would contend that inasmuch as the second defendant filed a written statement

and gave evidence categorically admitting the due execution of the settlement deed in favour of the plaintiff, nothing further survives for

consideration before the court regarding the truth and validity of the settlement deed. The settlement deed, according to the learned counsel for the

first respondent, is a simple settlement deed. No legal grounds enumerated u/s 126 of the Transfer or Property Act are available in this case, which

would enable the second defendant to revoke the settlement deed. According to her the settlement deed was duly executed, attested and accepted

by the donee and acted upon by her. Therefore the settlement deed in favour of the plaintiff had become complete and from the date of execution

of the same, the second defendant had completely divested herself of all her rights in the said property and the settlement deed is incapable of

being revoked. As far as the maintainability of the suit without a prayer for possession, the learned counsel for the plaintiff would contend that

section 34 of the Specific Relief Act has no application to the case on hand. According to her, it is not established that the first defendant is the

owner of the suit properties. On the other hand the house property is in the occupation of defendants 3 to 7 as tenants. Inasmuch as possession is

with the plaintiff and possession of defendants 3 to 7 being in the nature of tenants, the plaintiff need not ask for the relief of possession and it is

enough if the plaintiff files a suit for a mere declaration of title only. The collection of rents from the tenants is a permissive one and in any event the

collection of rents is not in exercise of any right contrary to the interest of the plaintiff.

8. In the light of the arguments advanced by the learned counsel on either side, I perused the entire materials available on record. In this appeal the

following substantial issues arise for consideration:

(a) Whether the suit for declaration of title without a further relief of recovery of possession is maintainable in view of the proviso to section 34 of

the Specific Relief Act 1963?

(b) Whether the settlement deed in favour of the plaintiff is true and valid and is it capable of being revoked?

(c) Whether the revocation deed and the subsequent release deed in favour of the first defendant are true, valid and binding on the plaintiff?

(d) Is not the first defendant in possession of the suit properties?

I am of the opinion that all the issues can be considered together on the materials available. Ex.A.1 is the settlement deed executed by the second

defendant in favour of the plaintiff. For a gift to be valid, the transfer of the immovable property must have been made voluntarily and without

consideration by one person called the donor to another person called the donee and accepted by or on behalf of the donee. The second

defendant is the donor and the plaintiff is the donee. Ex.A.1 evidences the transfer of immovable property in favour of the plaintiff. u/s 123 of the

Transfer of -Property Act, the transfer must be effected by a registered instrument signed by and on behalf of the donor and attested by atleast two

witnesses. Here also Ex.A.1 is a registered instrument and two witnesses, have attested the same. About the due execution of the settlement deed,

the donor herself had filed a written statement admitting the due execution of the settlement deed in favour of the plaintiff out of her own free will

and violation and without any consideration. Though the first defendant would contend that Ex.A.1 was brought about under suspicious

circumstances and that fraud has been played by the plaintiff on the second defendant, but for which the second defendant would not have

executed the settlement deed in favour of the plaintiff, yet I find from his written statement that the allegation in regard thereto is very scanty. What

are all stated by the first defendant in his written statement is that the settlement deed came to be executed by the second defendant at Madras on

she being taken to Madras under the pretext of treating her eye and thus the second defendant was cheated. No other pleading on any of the legal

ground available for cancellation of a contract, is pleaded in the written statement of the first defendant.

9. u/s 126 of the Transfer of Property Act, a gift can be suspended or revoked by the donor only in the stated circumstances therein. One of the

circumstances is that on the happening of any event, which does not depend on the will of the donor, a gift shall be suspended or revoked. In this

context I perused Ex.A.1., settlement deed. It is a very simple settlement deed executed out of sheer love and affection which the second

defendant had towards her daughter/plaintiff. No reservation had been made in this settlement deed for revocation of the same on the happening of

any specific event, which was not within the control of the second defendant. Therefore this ground to have the settlement deed revoked, is not

available at all. Section 126 of the Transfer of Property Act also provides for revocation of the settlement deed ""on any ground on which the

contract can be rescinded except the ground of want of or failure of consideration."" None of the grounds available under the Contract Act namely,

undue influence, coercion, misrepresentation or fraud, are neither pleaded nor established. The only plea available in the written statement is that

under the pretext of taking the second defendant for treatment of her eye at Madras, the settlement deed came to be executed and registered at

Madras. Even in his oral evidence, the first defendant as D.W.1 would state that at or about the time when Ex.A.1 came to be executed, she was

in the house of the plaintiff and she was ailing and she was there to undergo eye surgery. When he asked his mother, she said that she was taken to

Madras and there her signature was obtained in a document. Beyond this there is no other material available in the oral evidence, which may be

taken into account to decide the truth or otherwise of the settlement deed. On top of this, the second defendant pleaded and gave evidence that

she executed the settlement deed in favour of the plaintiff out of her own volition and will and for the love and affection she had for the plaintiff. In

my opinion the stand of the second defendant before the court, both in the pleading and in the oral evidence, clearly demolish the case of the first

defendant that Ex.A.1 was not duly executed by the second defendant out of her own free will and volition and it was brought about only under

suspicious circumstances. Under these circumstances, I have no hesitation to hold that Ex.A.1 is not tainted with any illegality and it is true, valid

and binding. I also find that the second defendant has no legal authority to revoke the settlement deed in favour of the plaintiff, in view of the

absence of grounds as enumerated u/s 126 of the Transfer of Property Act.

10. In a judgment of this Court reported in Ankama v. Narasayya, AIR 1947 Mad. 127 brought to my notice by the learned counsel for the

plaintiff, was held as follows:

''in the absence of any express reservation of a power of revocation in the gift deed, a donor does not continue to have the right to revoke a gift.

In another judgment of this Court reported in R. Kumarasamy Kounder Vs. V. Ezhumalai Kounder, it has been held as follows:

The gift once accepted by or on behalf of the donee cannot be thereof revoked under any circumstance for if a man will improvidently bind himself

up by voluntary deed and not reserve a liberty to himself by a power of revocation, the court will not loose the fetters he has put upon himself.

If the donor has no power of revocation at all, he ceases to have any interest or right in the property on his divesting himself of his title in favour of

the donee, in which case there is no question of the donor continuing after the gift to be an ostensible owner and of any equity arising in his favour

within the meaning of section 41 of the Transfer of Property Act.

In the case of hand the plaintiff had pleaded that she accepted the settlement deed and it was acted upon. She raised a loan mortgaging the ''B''

Schedule property in favour of one Veerapandiyan and the said document is dated 29.11.1985 marked as Ex.A. 16. It is her case that the ''A''

Schedule Property is in the occupation of the tenants namely defendants 3 to 7 and having regard to the relationship between the parties, she

allowed the first and the second defendants to collect the rents from them. It is her further case that the 5th defendant is paying the rent to her now.

However the first defendant would deny such a statement and contend otherwise stating that the plaintiff never took possession of the properties

settled on her and that he was collecting the rents from the defendants in his own right. It is his further case that he and the second defendant were

enjoying the suit properties as the joint family properties. But in his oral evidence as D.W.1, he would admit the partition in the year 1975, under

which his mother got the ''A'' Schedule property. He would further admit that till the year 1982 it belonged to his mother and it is that property

which was settled under Ex.A.1. Though the first defendant would contend that the ''B'' Schedule property was purchased benami in the name of

his mother by his father, yet there are no material whatsoever on record to establish such a plea. The purchase of the ''B'' Schedule property is

proved to be by the second defendant herself and the sale deed in respect of that property is dated 8.10.1973, which is marked as Ex.A.17 in this

case.

11. The original sale deed in respect of the ''B'' Schedule property is in the custody of the plaintiff and she had also produced the same before the

lower court. In view of the fact that the ''A'' Schedule property was allotted to the second defendant under the partition deed giving her absolute

ownership over the same and the ''B'' Schedule property having been purchased by her in her own name under the sale deed of the year 1973, it is

not possible to even infer that the first defendant and the second defendant were enjoying both the suit properties as the joint family properties.

There are no materials on record to show about the existence of any joint family and the joint family owning any properties. Therefore it at all the

first and the second defendants had exercised the right of collecting the rents from defendants 3 to 7 it cannot be said that it is dehors the right, title

and interest of the plaintiff over the same. The materials available on record do not establish that either the first defendant or the second defendant

was exercising any independent right of their own after the settlement deed in favour of the plaintiff came to be executed over the ''A'' Schedule

property. The plaintiff''s case that having regard to the relationship between the parties defendants were allowed to collect the rent, appears to be

probable and reasonable. The second defendant had not taken any stand at all contrary to the interest of the plaintiff. The first defendant had not

established that he was collecting the rents under any other authority. Inasmuch as the second defendant is not disputing the right, title and interest

of the plaintiff over the suit properties and it is only the first defendant, who is denying the plaintiff''s right, the burden is on him to establish that he

had been exercising rights over the properties forming the subject matter of the suit in his own right and not otherwise. In my opinion the first

defendant had not established the same. As already noticed, the plaintiff mortgaged the ''B'' Schedule property and raised a loan. The fact that

there was no mutation in the records after the settlement deed in favour of the plaintiff, by itself cannot be a ground to hold that Ex.A. 1 is not valid.

In respect of the landed property the receipt for payment of kist is stated to be Ex.A.4 and it is in the name of the second defendant. Ex.A.4

relates to fasli 1395 for pattal Nos. 415 and 517. Ex.A.5 is again in the name of the second defendant evidencing payment of house tax for ''A''

Schedule property. It is no doubt true that Exs.B.4 and B.5 are in the name of the first defendant. Ex.B.5 relates to faslis 1389 to 1393 for patta

No. 415. Ex.B.4 relates to fasli 1394 for patta No. 415. Exs. B.4 and B.5 show that kist was paid by one Shahul Hameed for Thiagarajan

(defendant No.1). However the house tax receipts namely, Exs. B.6 to B.10 are in the name of the second defendant. Exs.B.6 and B.7 relate to

Door Nos. 3A, 3B; Ex.B.8 and B.9 relate to Door No.3 and Ex.B.10 relates to Door Nos. 3A and 3B, alt in Trichy Trunk Road. Ex.B.11 and

B.12 dated 2.6.1986 and 5.3.1987 continues to stand in the name of Subbarayan, the late husband of the second defendant. There is nothing in

this to connect them with the ''A'' Schedule property. Ex.A.6 dated 26.2.1987 is the letter from the Assistant Engineer, Electricity Board to the

plaintiff. It appears that there was some inaction on the part of the plaintiff in having her name brought on record in respect of the properties settled

on her. The first defendant had produced only Exs. B.4 and B.5 stating to be in evidence of payment of land revenue in respect of the ''B''

Schedule property. Excepting these two receipts, the first defendant had not brought before court any other evidence, which would establish his

possession of the settled properties and he exercising any right of ownership over the same. Even Exs. B.4 and B.5 do not appear to relate to

Schedule ''B'' property. Patta No. mentioned therein is 415 and kist is shown to have been paid in respect of that patta No. from faslis 1389 to

1394 corresponding to English years 1979 to 1984. The first defendant claims to have got the ''B'' Schedule landed property only under the

release deed dated 29.9.1983, marked in this case as Ex.B.3. If that is so, it is not possible to reconcile as to how he would have paid the kist for

the ''B'' Schedule lands in his own name even from the year 1979. From the records namely, Ex.A.2, the partition deed dated 24.12.1975

between the first defendant and his father, it appears that the first defendant got from his father not only the house property, but also some vacant

sites. There is nothing on record to show that patta No. 415 mentioned in Exs.B.4 and B.5 relates to "B" Schedule property. Likewise I have also

to state that in Ex.A.4 also the patta Nos. mentioned are 415 and 517 and it evidences payment of kist in respect of those patta numbers for fasli

1395. Ex.A.4 is in the name of the second defendant. Fasli 1395 is equivalent to English year 1985. The settlement in favour of the plaintiff is in the

year 1982. Though the plaintiff also had not let in any evidence as to whether patta Nos. 415 and 517 mentioned in Ex.A.4 relate to "B" Schedule

property, yet her oral evidence is that Ex.A.4 relates to "B" Schedule property. Inasmuch as the had become the owner under the settlement deed

of the year 1982, it is probable that she would have paid the kist for the land as evidenced by Ex.A.4, since under Ex.A.1, settlement deed there is

a direction to her to pay the kist as well as the municipal tax for the properties concerned in that document. Ex.A.5, the house tax receipts relate to

Schedule "A" property and it is in the name of the second defendant. The first defendant had produced Exs. B.6 to B.10 as house tax receipts. All

those receipts also stand in the name of the second defendant. Out of those house tax receipts, Exs.B. 8 and B.9 alone relate to "A" Schedule

property and the others relate to some other properties. Under the partition deed marked in this as as Ex.A.18; to which the second defendant is a

party, she was allotted a number of properties. The plaintiff"s case in oral evidence is that the second defendant continued to live in the house

property even after the settlement in her favour. Three appears to be nothing wrong about this, in view of the close relationship between the parties

and a substantial portion of the building being in the occupation of the tenants. Her evidence shows that though Exs.A.4 and A.5 stand in the name

of the second defendant, yet it is she, who had paid those dues.

12. In the light of the above discussions I have no hesitation to hold that not only Ex.A.1 was duly executed, attested and not tainted with any

illegality, but it was also accepted and acted upon. I am also of the considered opinion based on the materials available on record that the plaintiff

is in constructive possession of the suit properties through her tenants and her mother. On the date of the plaint the mother is shown to be residing

in a property other than "A" Schedule property. Even assuming for a moment without conceding that the plaintiff never took possession of the suit

properties, as hotly contested by the first defendant and that he continued to be in possession of the same despite the gift in favour of the plaintiff,

yet I am of the opinion that it is of absolutely no substance. Mrs. Hema Sampath learned counsel appearing for the plaintiff would contend that

even assuming for a moment without admitting that possession has not been given to the plaintiff by the donor namely, the second defendant, yet it

does not affect the legality or the validity of the gift, if the donee establishes acceptances of the gift. In support of this, the learned counsel brought

to my notice the following three judgments of this Court:

(a) Govindammal and Others Vs. Ammasi Kounder, ; (b) J. Kuppuswami Mudali and Others Vs. Mahalingam, and (c) Kumaraswamy Kounder

v. Elumalai Kounder, 1996 (U) C.T.C. 150

In Govindammal and Others Vs. Ammasi Kounder, it has been held as follows:

Section 123 of the Transfer of Property Act does not contemplate handing over of possession of properties when the property gifted is

immovable property. The contention that there was no handing over of the suit properties by the settlor P.W.2 to plaintiffs 1 to 4 and therefore the

settlements were not valid, has no substance.

In J. Kuppuswami Mudali and Others Vs. Mahalingam, it has been held as follows:

Transfer of Property Act 1882, Section 123 - Deed of Settlement -Delivery of possession - Registered settlement deed - Property settled under

registered settlement deed and settlee accepting transfer - Settlement deed is, presumed to be acted upon once settlee accepts transfer and

delivery of possession is not necessary Settlement cannot be cancelled once deed of settlement is acted upon.

In R. Kumarasamy Kounder Vs. V. Ezhumalai Kounder, it has been held as follows:

Transfer of Property Act, 1882, Section 122,- Acceptance of gift - Nature of proof -Very slight evidence is sufficient to prove acceptance of

simple gift circumstances can also speak for acceptance of gift mere silence may be indicative of acceptance of gift if donee had knowledge of gift -

Acceptance does not require direct evidence and it may be expressed or implied - it may be inferred from facts and surrounding circumstances

attending transaction of gift.

13. In the context of the circumstances under which a gift can be possibly revoked and what constitutes acceptance, Mr.N.S. Varadhachari,

learned counsel for the appellant brought to my notice a judgment of this Court reported in Chennupati Venkatasubbamma v. Nelluri

Narayanasamy, 1954 (1) M.L.J. 194. In that case it has been held as follows:

If there is acceptance of a gift after execution of the deed, even though the registration was postponed to a later date the gift would become

irrevocable. But the fact that the deed was executed and registered would not make it irrevocable if in fact there was no acceptance by the donee

either before registration but after execution or even after registration. Anterior negotiations or talks about the transfer of property by way of gift

would not make it amount to acceptance of the transfer of the property by gift. The law requires acceptance which may even be implied. But the

facts relied on to draw an inference of acceptance must be by acts of positive conduct on the pan of the donee or persons acting on his behalf and

not merely passive acquiescence such as standing by when the deed was executed or registered.

Where a deed of gift was executed on 15th May, presented for registration on the 16th revoked on the 19th and the fact of revocation

communicated on 4th June and notwithstanding the execution the deed continued to remain in the hands of the donor even after its registration, and

possession of the properties was not delivered to the donee during the material period and there was no evidence of positive conduct of accepting

the gift before revocation, the cancellation of the gift deed is valid.

In the case on hand, I have already found that accepting the gift the plaintiff-had even mortgaged a part of the settled properties under Ex.A. 16

dated 29.11.1984. Besides that the plaintiff had also produced Exs.A.5 and A.6, the land revenue receipt and house tax receipts, standing in the

name of the second defendant, which according to her was paid by her. Therefore I am of the opinion that there is more than sufficient evidence in

this case to show that there are positive acts on the part of the plaintiff evidencing acceptance of the gift. On facts therefore I find that the judgment

reported in Chennupati Venkatasubbamma v. Nelluri Narayanasamy, 1954 (1) M.L.J. 194 brought to my notice by the learned counsel for the

appellant, does not get attracted to this case. It is not as though in this case there is total absence of material on the side of the plaintiff for having

accepted the gift.

14. Relying upon the recitals in the partition deed dated 30.11.1975 namely, Ex.A. 18, Mr. N.S. Varadhachari, learned counsel would contend

that the properties allotted to the second defendant in that partition deed (corresponding to "A" Schedule property in the plaint), cannot be treated

as her absolute property and it was in her hands only for the benefit of her children namely, the plaintiff and the first defendant. Therefore according

to the learned counsel for the appellant, the second defendant would have no legal authority to execute the settlement deed in respect of such

property in her hands and her rights are only limited. I perused the recitals in Ex.A. 18. It is stated in Ex.A. 18 that as Subbarayan was aged and

that he may the any time on account of his failing health, the partition deed had been brought about to avoid any possible dispute in future between

the second defendant; the first defendant; the plaintiff and children of Gopal, the late brother of Subbarayan. The further recital in the partition deed

is that each of the parties to the partition deed would enjoy the respective properties allotted to them as absolute owners with possession, right of

alienation....It is also stated therein that each of the parties to the partition deed would have no right whatsoever over the property allotted to the

other. Therefore it is not possible to hold on the basis of the recitals referred to above found in Ex.A. 18, that the second defendant has only a

limited interest. But on the other hand in my opinion the second defendant had become the absolute owner of the same. In view of this, I am unable

to agree with Mr. N.S. Varadhachari, learned counsel for the appellant that the second defendant had no legal right or authority to execute the

settlement deed in favour of the plaintiff in respect of the properties allotted to her under the partition deed.

15. Then remains the legal question to be answered namely, whether without prayer for recovery of possession, would a suit for declaration of title

alone be maintainable? In this context Mr.N.S. Varadhachari, learned counsel appearing for the appellant brought to my notice a judgment of this

Court reported in Cheventhipaul Nadar Vs. Srinivasa Nadar and Others, . The brief facts in that case are that the plaintiff filed a suit for declaration

of title in respect of 10 items alleging that the plaintiff is in possession of all those items. The defendants denied possession of the plaintiff, but

pleaded possession with them. In respect of the disputed items namely, 5 to 9 the finding was that the plaintiff was not in possession. On those

facts the trial court dismissed the suit stating that in respect of item Nos.1 to 4 and 10 the plaintiff''s right and title were not disputed and therefore

no decree need be passed so far as those items are concerned. In respect of the other items the court found that the plaintiff is not entitled to

declaration and as possession was not shown to be with him, even the relief of injunction was negatived. The appellate court also confirmed the

judgment of the trial court. Before this Court a legal objection to the maintainability of the suit was raised on the finding rendered by the learned

trial Judge namely, the plaintiff had not shown his possession in respect of item Nos. 5 to 9 and therefore without a prayer for recovery of

possession, the suit for declaration of title is not maintainable. A learned Judge of this Court found that the plaintiff''s case of he being in possession,

was not established and that item Nos. 6 to 8 were found to be in possession of the 6th defendant. In the context of those facts and relying upon

section 34 of the Specific Relief Act 1963 corresponding to section 42 of the 1877 Act, the learned Judge held as follows:

Though the plaintiff had proceeded on the basis that he was in possession of the suit properties and claimed the relief of injunction, the evidence

had disproved his possession. Since the plaintiff, who was found to be out of possession of the disputed items of the suit properties had not sought

for recovery of possession as a consequential relief for the main relief of declaration of title, the suit could not be maintained.

16. In the case referred to above this court on facts found that the defendants themselves were in possession of the property and no tenants were

involved. Therefore the relief of possession was capable of being asked against the defendants. Only in that context, the learned Judge had held

that ""a mere suit for declaration of title alone is not maintainable"". That judgment takes into account an earlier judgment of the Hon''ble Supreme

Court of India reported in Ram Saran and Another Vs. Smt. Ganga Devi, . In that judgment of the Hon''ble Supreme Court of India the facts

notice were that the defendants were in possession of the suit property. In the case on hand the facts are that the house property is shown to be in

the occupation of the tenants namely, D.3 to D.7. The oral evidence of the plaintiff is that the donor also continued to be in possession of the house

property alone. The donor is not disputing the claim of the plaintiff. It is no doubt true that Ex.A.7 is the lawyer''s notice dated 25.9.1983 issued on

behalf of the plaintiff to the defendants calling upon them to surrender possession of the properties. The address for service of notice as far as

defendants 2 to 7 are concerned is shown as No.3, Trichy Trunk Road, Villupuram. The address for service of notice on the first defendant is

shown as No.1 Trichy Trunk Road, Villupuram. ''A'' Schedule property in the case on hand bears Door No.3 in ward No, 12, Trichy Trunk

Road, Villupuram. In this notice it is mentioned that the second defendant continued to be in possession of the properties mentioned at the foot of

the notice namely, ''A'' and ''B'' Schedule properties; the second defendant let the shop to defendants 3 to 7 and was collecting the rent and the

first defendant was managing the lands. Mr. N.S. Varadhachari, learned counsel relying on this notice contended that inasmuch as the plaintiff

demanded surrender of possession, it means that she is out of possession of the suit properties. According to him, it also means that, the first and

the second defendants namely, the brother and mother of the plaintiff, are in possession of the properties. Therefore when the plaintiff is prima facie

shown to be out of possession of the properties on her own showing, she should have asked for recovery of possession as well. I am unable to

agree with this contention of the learned counsel for the appellant for more than one reason. A reading of the averments contained in Ex.A. 7 only

recognise the possession of the second defendant (mother) of the suit properties and she collecting the rents. Besides this, it also refers that the first

defendant was managing the land. In my opinion, these statements, in Ex.A. 7 would not amount to treating possession of the suit properties with

either the first defendant or the second defendant in their own right and at best it only paeans that it is permissive in nature and in any event there is

no admission in Ex,A.7 that the first defendant is in possession of any of the suit properties. No doubt in the plaint there is an allegation that having

regard to the relationship between the parties, the first and the second defendants were asked to collect the rents from defendants 3 to 7 by the

plaintiff. In the plaint the address for service of the first and the second defendants is given as No. 1 Trichy Trunk Road, Villupuram whereas the

address for service of defendants 3 to 7 is given as No.3, Trichy Trunk Road, Villupuram. I have already stated that, No.3, Trichy Trunk Road,

Villupuram is the "A" Schedule property. Mr. N.S. Varadhachari, learned counsel for the appellant would contend that in "A" Schedule property

the first and the second defendants are living and though Door No.1, Trichy Trunk Road is given as the address for service of defendants 1 and 2,

yet it relates only to "A" Schedule property. In other words the learned counsel would contend that Door Nos. 1 and 3, Trichy Trunk Road,

Villupuram are one and the same and "therefore when the plaintiff had admitted that the second defendant continued to live in the property" even

after the settlement in her favour, it must be held that the first and the second defendants are residing in "A" Schedule property. This again appears

to be wrong in my considered opinion. The reasons are as follows:

Ex.A.1, the settlement deed in favour of the plaintiff is dated 22.10.1982. "A" Schedule property is shown as Door No. 3, Ward No.12, Trichy

Trunk Road. "A" Schedule property is shown to lie to the north of the house property of Thiagarajan and others and the common path-way.

Ex.A.2 is dated 24.12.1975 and it is between the first defendant Thiagarajan and his father. "A" Schedule property described in that document

went to the father and "B" Schedule property described therein went to his son Thiagarajan, the first defendant. One of the properties described in

"A" Schedule property in that document had Door No.3 belonging to Paripurana Ammal (second defendant) and the nine feet common passage

was the northern property. One of the properties allotted to Thiagarajan (first defendant) in that partition deed is Door No.1, East of Trichy Trunk

Road having also Door Nos. 808, 808-A, 808-B, 808-C, 808-D, Nehru Road in Ward No.12. Therefore it is clear from the above documents

that there are two distinct Door Numbers namely, Door, Nos. 1 and 3, Trichy Trunk Road, Villupuram. Door No.1 belongs to the first defendant

and Door No.3 originally belonged to the second defendant and Door No.3 Originally belonged to the second defendant, who later on settled the

same in favour of the plaintiff. I have also already noticed that the first and the second defendants were served with summons in the suit at Door

No.1, Trichy Trunk Road, Villupuram, as it is that address that is given as their address for service. The entire materials available on record do not

establish in any manner that either the first defendant or the second defendant are in possession of the suit properties on the date of the plaint or

even thereafter. It is no doubt true that at one stage prior to the filing of the plaint, the plaintiff would admit that the second defendant continued to

be in possession of the suit properties. Inasmuch as the second defendant is emphatically supporting the plaintiff in her case, the stand taken by the

plaintiff with regard to her possession prior to the filing of the plaint and on the date of the filing of the suit, will not affect her case on merits.

Inasmuch as it is the first defendant, who is contesting the claim of the plaintiff, it is his case that with reference to possession alone must be

considered. At the risk of repetition I hold that the first defendant had not established his possession of the suit properties at any point of time. The

first defendant had also not established that the 6th defendant vacated and delivered vacant possession of the portion of the premises which was in

his occupation. The second defendant had also not established that he had over collected the rents from the other defendants.

17. In my view section 34 of the Specific Relief Act, 1963 would be attracted to a case only when the main relief under the section and the further

relief under the proviso are directed against the same defendants. The main relief in this case for declaration of title is directed against the first and

the second defendants. The further relief of possession, even assuming that the plaintiff is not in possession, can be directed only against defendants

3 to 7, since they are the tenants. In other words, if the relief of possession of house property has to be asked against the first and the second

defendants, they may not be in a position to deliver possession of the same since admittedly the property is in the hands of the hands of the tenants

and their rights are protected under the Tamil Nadu Buildings (Lease and Rent Control) Act. In this context I noticed a judgment of the Hon''ble

Supreme Court of India in a case reported in Deokuer and Another Vs. Sheoprasad Singh and Others, . The facts in that case are as follows:

The property forming the subject matter of that suit was under attachment u/s 145 of the Code of Criminal Procedure. The suit was filed for a

declaration that the defendants had acquired no right or title to the property and the suit was decreed. On an appeal this court held that the

appellants were not in possession of the property on the date of the suit. The suit failed under the proviso to section 42 of the Specific Relief Act,

1877, as the appellants had failed to ask for further relief to recovery of possession from the respondents."" In the context of those facts, the

Hon''ble Supreme Court of India has held in that judgment as follows:

The further relief contemplated by the Proviso to section 42 of the Specific Relief Act is the relief against the defendant only. Where the defendant

is not in possession and not in a position to deliver possession to the plaintiff, the plaintiff in a suit for declaration of title to property need not claim

possession. In the case of an attachment u/s 146 of the Cr.P.C. as it stood before it''s amendment in 1955, a suit for bare declaration of title

without a prayer for delivery of possession is competent. The position in the case of an attachment u/s 145 of the Cr.P.C. is the same. In a suit for

declaration of title to property filed when it stands attached u/s 145 of the Cr.P.C.., it is unnecessary to ask for the further relief of delivery of

possession. Assuming that in the case of such an attachment, the Magistrate holds possession on behalf of the party, whom he ultimately finds to

have been in possession, the fact is irrelevant. It is unnecessary to ask for possession when property is in custodia legis. The property under

attachment u/s 145 of the Cr.P.C. is in custodia legis. The fact that the decree may not be binding on the Magistrate does not affect the

competence of the suit.

In the course of the judgment the Hon''ble Supreme Court of India has also held as follows:

The authorities clearly show that where the defendant is not in possession and not in a position to deliver possession to the plaintiff, it is not

necessary for the plaintiff in a suit for declaration of title to property to claim possession; see AIR 1938 73 (Privy Council) .

It is pertinent to observe that in AIR 1943 94 (Privy Council) it has been held that the further relief contemplated by the proviso to section 42 of

the Specific Relief Act is relief against the defendant only. We may add that in K. Sundaresa Iyer v. Sarvajana Sowkiabi Virdhi Nidhi Ltd. ILR

1939 Mad. 968. AIR 1939 Mad. 853 it was held that it was not necessary to ask for possession when property was in custodia legis. There is no

doubt that property under attachment u/s 145 of the Cr.P.C. is in custodia legis. These cases clearly establish that it was not necessary for the

appellants to have asked for possession"".

On a similar issue namely, about the impact of the bar created u/s 42 of the Specific Relief Act a Bench of two Judges of the Bombay High Court

in the judgment reported in Yamunable v. Ram Maharaj. AIR 1960 Bom. 463, held as follows:

Finally Mr. Paranjpe contended that the suit by the plaintiff for declaratory relief and for injunction was not maintainable. It is true that in this case

the plaintiff has claimed a declaration of her title to the Inam properties and has claimed a declaration that the first defendant be restrained by an

injunction from collecting the rents and profits thereof such a suit contends Mr. Paranjpe, is one purely for a declaratory relief and the court is

debarred from granting that relief on a claim made by the plaintiff in circumstances existing in the present case. But in 5 Bom. L. R. 195 it was held

by a Division bench of this court that- ""whether defendants are in constructive possession through tenants and plaintiff desires to have constructive

possession only, the utmost that the plaintiffs can ask for, or obtain, against the defendants is the declaration of rights, binding the defendants,

coupled with an injunction preventing them from interfering with such rights."" It was further held that - ""the plaintiff is not bound to ask for actual

physical possession from the tenants and that there is no rule of law to compel a man to seek for all the relief that he is entitled to or might obtain if

he decided it."" In our view the suit was properly framed. On the view taken by us the decree passed by the trial court will be confirmed and both

the appeals will be dismissed with costs.

18. In Gian Chand v. Bhagawan Singh, AIR 1932 Lah. 97, two learned Judges of that court has held as follows:

The plaintiff''s suit for a declaration of ownership of a certain houses occupied by a tenant on the basis of ""will"" of deceased owner. The defendant

was not in possession of the house, but was obstructing the plaintiff from realising the rent from the tenant. The trial court held that the suit should

have been brought for possession. Held that the suit as filed was a proper one. Under the said circumstances a suit for possession was not

necessary nor would it have Lessened litigation and the order rejecting the plaint was consequently wrong.

In a case reported in Muthukumaraswamia Pillai and others v. Subbaraya Pillai and others, AIR 1981 Mad. 505, it has been held as follows:

As regards possession of the lands it is true that the plaintiff have not secured actual possession of any of the lands attached to the office; but, as

pointed out by the Subordinate Judge, many of the tenants have attorned to them while some of the tenants attorned to the trustees. Where the

parties to the suit are scrambling for possession and the tenants are taking sides, some recognising one claimant as their landlord and some other, it

has been held in this court by the judgment reported in ILR 15 Mad. 307, ""case is eminently one in which a declaratory decree is desirable to

avoid multiplicity of suits and to obtain a decision once and for all it will secure peaceful possession of the properties; there is nothing in the

language of the proviso to section 42 of the Specific Relief Act 1877 to prevent the court from passing a declaratory decree in the case.

The learned Judge after referring to the judgment referred to above held that on the facts of that case, a suit for mere declaration and injunction

without a prayer for possession can be maintained.

19. All the judgments noticed by me above, in my respectful opinion, squarely applies to the case on hand. As found by me earlier, the first

defendant had not established that he is in possession of the suit properties. "A" Schedule property is shown to be in the possession of defendants

3 to 7 as the tenants. The first defendant had also not established that the 6th defendant vacated and delivered possession to him. The second

defendant is now dead. Therefore as held by the line of decisions referred to above the first defendant would not be in a position to deliver

possession of the property to the plaintiff. Hence I am of the considered and firm opinion that the suit as framed in this case for declaration of title;

for an injunction restraining the first and the second defendants from alienating the suit properties and restraining defendants 3, 4, 6 and 7 from

paying the rent to the first and the second defendants, is a properly instituted suit. The injunction relief is not with reference to the peaceful

possession and enjoyment of the property by the plaintiff. On the other hand it is only to restrain the first and the second defendants from alienating

the suit properties and to restrain defendants 3,4,6 and 7 from paying the rent to the first and the second defendants. In view of the title having

been declared, the plaintiff could have been granted the decree for injunction as well. However the learned trial Judge appears to have completely

missed the very scope of the prayer and the allegation in the plaint forming the basis for the said prayer. Inasmuch as I have held that the plaintiff

had established constructive possession of the "A" Schedule property through the tenants; possession of the "B" Schedule property by exercising

the rights over it and there being no contra evidence to show that the first or the second defendant is in possession of "A" and "B" Schedule

properties, the plaintiff should have been granted the injunction prayer also as prayed for by her. The cross objections filed by the plaintiff is

directed against the judgment of the lower court negativing the relief of injunction prayed for by the plaintiff. The reasons given by the learned trial

Judge for not granting that relief appears to be wholly erroneous. The trial court"s finding that the plaintiff is not in possession, is not In order and I

have found in this case that the plaintiff had established possession. Therefore there cannot be any legal objection for the cross objection being

allowed.

20. In view of the foregoing discussions on the controversy between the parties, I have to hold that there are no merits in this appeal. Accordingly

the appeal fails and consequently the same is dismissed with costs throughout. The cross objections deserve acceptance and they stand allowed

with costs throughout.