Pichakannu Rowther and Another Vs Aliyarkunju Lebba

Court: High Court Of Kerala

Date of Decision: Dec. 14, 1962

Citation: (1963) KLJ 497

Hon'ble Judges: S. Velu Pillai, J

Bench: Single Bench

Advocate: T.S. Krishnamoorthy Iyer, for the Appellant; T.K. Narayana Pillai, D. Narayanan Potti and K.K. Jinarajan, for the Respondent

Final Decision: Dismissed

Judgement

Velu Pillai, J.
Plaintiffs 1 and 2 who are the daughters of one Hassan Ghani Rowther, and their assignee the third plaintiff, sued for partition

of 2/3rd of 7/8th share of the suit properties. The suit was contested mainly by defendants 4 and 8 who are the appellants in this second appeal.

Hassan Ghani Rowther had made a gift of item 1 and of portions of items 2 and 5 of the suit properties by Ext. I dated the 23rd Meenom, 1099 in

favor of the five children of his deceased brother, three of whom are defendants 1 to 8 and the other two, were the predecessors-in-interest of

defendants 4 and 6 and of the 7th defendant. Hassan Ghani Rowther died in the year 1107. In execution of the decree Ext. II, in O. S. 207 of

1113, the 8th defendant purchased a portion of item 2 of the suit properties. The main contention of defendants 4 and 8 in the courts below and in

second appeal was founded on Ext. I. This was held to be a valid gift by the trial court and on appeal to be invalid, under the Mahomedan Law,

there having been no delivery of possession under it. The appellate court has found on the oral evidence and on the terms of Ext. I, that there had

been no delivery of possession under Ext. I. In this court the terms of Ext. I were relied on. In it the donor recited, that the properties were being

gifted in accordance with the provisions thereinafter contained, declared that subject to his possession and enjoyment which was not to be

disturbed, the donees may possess and enjoy the properties along with him, undertook that tax would be paid and receipt taken in their names out

of the income, and stipulated that the donees will take the properties absolutely after his lifetime. It is quite clear, that by Ext. I the donor did not

divest himself completely of all dominion over the properties gifted, but reserved possession and enjoyment with himself, though perhaps jointly

with the donee; in any event, possession and enjoyment of the latter were to be subject to that of the donor. As I understand it, tax was to be paid

by the donor out of the income of the properties, though in the names of the donees. The donees were entitled to the properties absolutely, only

after the lifetime of the donor.

2. It is a fundamental rule of Mahomedan Laws as regards gifts, that ""the donor should divest himself completely of all ownership and dominion

over the subject of the gift"". Mulla on Mahomedan Law, 15th Edition, page 130, Section 148. ""It is essential to the validity of a gift that there

should be a delivery of such possession as the subject of the gift is susceptible of"" Mulla on Mahomedan Law page 131, Section 150. A gift with a

reservation of possession by the donor during his life was held to be void in K. S. Mahomed Aslan Khan v. Khalilal Rehman Khan (A, I. R. 1947

P, C. 97) one thing is clear, that by reserving undisturbed his right to be in possession and enjoyment, the donor did not divest himself completely

of all dominion over the properties, though in a sense, he purported to associate the donees with himself; nor could such associating the donees in

the matter of possession and enjoyment with him, be deemed to be delivery of such possession, if at all, as the properties were susceptible of. I am

not prepared to hold that a stipulation that the donor and the donees shall be in joint possession, satisfies the requirement of delivery of possession

in a gift under the Mahomedan Law. Even where the donee resides with the donor in the property, although no physical departure by the donor or

formal entry by the donee is necessary, the gift has to be completed by the donor indicating a clear intention on his part to transfer possession and

to divest himself of all control over the Subject of the gift.

3. The learned counsel for the 8th defendant attempted two modes of Construing Ext. I: first, that it is an out and out gift of the corpus of the

properties and any condition in it repugnant to the gift is void, and second, that it is a gift of the corpus of the properties with a reservation of the

right to take the usufruct for himself. In my view, both these are not possible on the terms of Ext. I. As observed, in the opening part of Ext. I it

was recited that the transfer was to be subject to the provisions thereinafter contained and the operative part declared, that the gift was to be

subject to the donor''s right of possession and enjoyment. The gift of the corpus was not absolute in its terms, in order that the condition imposed

may be regarded as repugnant. It is not also possible to read Ext. I as limiting the right of the donor to collect the usufruct of the properties during

his life-time. In this view, it is unnecessary to deal with AIR 1948 134 (Privy Council) or with K. Veerankutty v. Pathummakutty Umma (A. I. R.

1956 Madras 514) or with Maitheen Been Umma v. Ithappiri Varkey (1956 K. L. T. 444) on which reliance was placed. For the above reasons,

I agree with the Subordinate Judge in coming to the conclusion that Ext. I is not valid. The question of limitation for setting aside Ext. I does not

arise. This would have sufficed for passing a preliminary decree for partition, because the other issues except issue 2 were not pressed in the trial

court, by the contesting defendant. However, it was urged, that as the two plaintiffs were parties to the decree and execution proceedings in O. S.

207 of 1113, apart from any principle of res judicata, the sale of a portion of item 2 in execution could not be ignored or impeached by the

plaintiffs. The point no doubt seems to be covered by the pleadings, though no issue was raised on it. It does not appear to have been taken in

either of the courts below at the hearing or in the grounds of the appeal memorandum in this court. Whatever be the merits of this contention, as to

which I express no opinion, the point seems to call for an answer and being supported by the pleadings, I feel that the trial court must be directed

to consider the same in passing the decree.

The result is that with the above observations, the appeal is dismissed with costs.